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Supreme Court of the United States

October Term, 1959

No. [redacted] 472

UNITED STATES OF AMERICA, EX REL. SOL R. RAUCH and HAROLD D. RAUCH,

Relators-Petitioners,

against

JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Sol R. Rauch and Harold D. Rauch, respectfully pray that this Court issue its Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Eastern District of New York dismissing Writs of Habeas Corpus heretofore issued out of said Court against the respondents who are the United States Marshals for the Eastern District of New York.

The Circuit Court of Appeals has denied a petition for a stay of its mandate pending final disposition by this Court. The order thereon is dated August 3, 1959.

The District Court for the Eastern District of New York granted a stay, conditioned upon the submission to this Honorable Court of the instant petition within thirty days from its date to wit: September 22, 1959.

Opinion Below

The opinion of the United States Circuit Court of Appeals by Waterman, J. in which Hincks and Lumbard, JJ. concurred has not yet been officially reported. An official printed copy thereof will be submitted herewith.

The decision of the District Court is officially reported in 170 F. (Supp.) 506. This will be found printed in the appellants' appendix at page 28a.

Jurisdiction

The decision of the United States Circuit Court of Appeals was dated and entered on July 10, 1959.

The order of the aforesaid Court denying the petitioners' application for a stay pending review by this Court, is dated July 17, 1959.

The application on the petition for rehearing in the United States Circuit Court of Appeals was denied and the order thereon is dated August 3, 1959.

Jurisdiction to review such decision and judgment by the Writ of Certiorari presently prayed for is conferred on this Court by Section 1254, Title 28, United States Code and is invoked pursuant thereto.

The Subject Matter of the Appeal

Extradition of these petitioners—United States citizens and residents of the State of New York—at the baseless request of the Canadian Government, is the subject matter involved herein.

Constitutional Provisions, Treaty Requirements, Court of Appeals Decisions and Those of This Court, Statutes and Regulations Are Here Involved

These petitioners contend that since the Canadian indictment as well as the complaint based thereon are clearly defective because of specific omissions, the United States Commissioner had no jurisdiction to hear these extradition proceedings and to rule thereon. Indeed, his findings should have been overruled by the District Court in the first instance, but at all events by the Circuit Court of Appeals.

The legal issues involved upon this appeal concern the Treaty between the United States and Great Britain of 1842, Article X thereof and their subsequent supplementary conventions (please see pp. 16 to 25 of Appellees' Brief—Treaties Involved); United States Constitution, Amendment VI (copy hereto attached, *infra*, p. 46); New York State Penal Law, Sections 1290 (Appellants' Brief (p. 48)[1] and 1290a (Petition of Relators-Appellants for Re-hearing, page 14 thereof)[1]; Section 276 of the Code of Criminal Procedure of the State of New York (Appellants' Brief, p. 52);[1] and also, the controlling decisions of the Court of Appeals of the State of New York, that being the highest judicial tribunal of the said State,[1] and other Courts (as cited and quoted in the Appellants' Briefs)[1] and the Canadian Criminal Code, Section 269 (Appellants' Brief, p. 45).[1]

The latest Court of Appeals' (New York) decision is dated *April 16, 1959*. The title is *Peo.* v. *McGuire*, and it is reported in 5 N. Y. (2nd) 523. It pointedly controls the instant situation.

It is still the recognized principle of law that since these petitioners surrendered themselves within the State of

[1] These were submitted in the United States Circuit Court of Appeals on the petitioners' appeal thereto. Copies are herewith submitted.

New York, that under the controlling decisions, statutory requirements as well as treaty provisions, the Courts below were compelled to respect the established rule that the laws of the State of New York guide and control the final disposition of extradition proceedings even though such proceedings are initiated at the behest of a foreign country.

The law of the State of New York controlled these extradition proceedings, and they must be conducted according to the mode of procedure there prevailing.

So held in the cases of *Vaccaro* v. *Collier*, 38 F. (2 ed.) 862; *U. S. ex rel. DiStefano* v. *Moore*, 46 F. (2 ed.) 308; *In re*: *Farez C. C. N. Y.* (Fed. C. A. S. No. 4,645); also *Muller's* case, Fed. Case No. 9,913.

Ex parte Sternamen, 77 Fed. 595, 596, quoted with approval by Fuller, C. J. in *Yordi* v. *Nolte*, 215 U. S. 227, 230. See also *Grin* v. *Shine*, 187 U. S. 181, 189; *ex parte Zentner*, 188 Fed. 344.

The Courts below including the United States Commissioner have completely disregarded and ignored the effectiveness of the pertinent treaty provisions, the requirements of the subsequent and supplementary conventions as well as the applicable constitutional provisions, statutes, court rulings and regulations as above stated.

Indeed, the decisions of this Honorable Court sustain the petitioners' foregoing contentions.

This case presents unusual circumstances due particularly to the conflicting and contrary ruling of the Court below.

There are, as is herein pointed out, very special and substantial constitutional questions of law involved which should be reviewed by this Honorable Court. These relate directly to the contentions of these petitioners and the erroneous determination of the Court below. The erroneousness of the lower Court decision will be demonstrated

in this presentation as will also the total disregard of the controlling case law and the statutory requirements applicable to the instant situation. These will become outstandingly apparent.

Justification for the Issuance of the Writ of Certiorari Presently Prayed For

This Court has ruled that its citizens may not be "• • • sent from the country merely upon demand or surmise • • •". *Bingham* v. *Bradley* (241 U. S. 511). Yet, that is just what has happened in the instant case by reason of the erroneous and unsupported rulings initiated by the United States Commissioner which the District Court, erroneously affirmed, and which the Circuit Court likewise mistakenly sustained.

The specific questions of law referred to above, pertain only to the first two counts of the indictment. They will be the only concern of this Court. The remaining two counts of the indictment are not extraditable offenses, did not concern the United States Commissioner nor the lower Courts and will not be the subject for review under certiorari.

The aforementioned questions of law (appearing on pages 47-49) are respectfully submitted in conjunction with the other contentions set forth herein to indicate to this Honorable Court that *there is substantial merit* to this application.

Statement of the Facts of the Case

The petitioner, Sol R. Rauch, is a member of the Bar of the State of New York and Harold D. Rauch is his brother.

The two petitioners together with several others undertook and completed a purely business transaction under the continuous supervision and advice of local counsel in the Province of Ontario, Canada. In addition to local counsel, bank officials aided and assisted in the completion of the transaction. The latter concerned the acquisition of stock holdings of Brilund Mines, Limited—a local company.

The record will confirm the fact that the transaction completed by all the persons named as defendants in the indictment together with others, in Canada, resulted from written contracts and commitments thereunder and constituted *in its entirety*, the culmination of a business transaction which had been approved and ratified by the Board of Directors of Brilund Mines, Ltd.

Indeed, in the further recital of the petitioners' contentions, we quote from the deposition (in evidence before the Commissioner and read by the Court below) of Mr. Fred Findlay, the manager of the Imperial Bank of Canada, where all the parties in interest including these petitioners gathered and the entire transaction (now complained of by the Canadian Government), was closed. Commencing at page 14 of the depositions, Mr. Findlay, *under oath*, at page 16, line 11, voluntarily said: "Throughout the meeting all these transactions were completed in an open fashion *without any attempt at secrecy.*" (Emphasis supplied.)

Many months subsequent to the completion of the transaction, local authorities in the Province of Ontario, Canada, believed that the transaction involved criminality. They sought and obtained an indictment against Ben Smith, Stanley Schonbrun and D. Charles Stuart and these two petitioners.

The indictment directed against all five contained four counts. (1) theft; (2) fraud and deceit; and (3) and (4) related to conspiracy. The latter two counts not being extraditable offenses were not the subject of the hearing before the Commissioner, or review or attack in the Courts below.

The depositions offered in evidence by the prosecution, established the fact, among others, that the transaction was approved and completed pursuant to resolutions adopted by the Board of Directors of the said Brilund Mines, Limited (of which the two petitioners together with other stockholders were members).

Based upon a long series of representations by Stuart, Wallace, Bauman, Ian Smith and Chechak's geological data (please see their depositions) as to value and appropriateness, Brilund Mines, Limited, through its Board of Directors, consented to acquire certain "proprietary claims" from the aforesaid D. Charles Stuart for the sum of $960,000.

Of the foregoing sum, according to the record evidence, $900,000 was paid by D. Charles Stuart to one Ben Smith for 600,000 shares of stock of the said corporation delivered to Capital Funding Corporation—a New York bank holding and industrial company—Stuart and Shonbrun. In addition thereto, Stuart paid $50,000 for fees to James Wallace, a Canadian lawyer, and Frank Bowman, a Canadian certified public accountant (Wallace and Bowman were not indicted).

Subsequent to the closing, Stuart also delivered to Stanley I. Schonbrun, the president of Capital Funding Corporation, the American counsel for the transaction, the sum of $5,990. The remaining $4,010 remained with Stuart.

None of the corporate stock, however, was delivered to, never was and is not now in the possession of these petitioners.

Pursuant to prior agreement, the Brilund Mines, Limited stock (involved in the transaction) purchased from Ben Smith, Hyman Goldstein and others, was delivered in various amounts to D. Charles Stuart, Capital Funding Corporation and Ian Smith (Canadian counsel)

as Trustee, for D. Charles Stuart and Capital Funding Corporation. Appropriate receipts were executed for these deliveries.

Subsequent to the finding of the indictment by the Grand Jury of Ontario, request was made by the Canadian government of the Secretary of State of the United States for the surrender of these two petitioners for extradition.

The request was processed and these two petitioners voluntarily surrendered to the United States Marshals for the Eastern District of New York, in the State of New York.

Proceedings were thereafter had before the United States Commissioner for the said Eastern District. These proceedings have been analyzed herein.

The several depositions referred to above, disclose the fact that practically each one of the individuals making his deposition requested and obtained "the protection of the evidence act". In the United States, this protection is customarily known as "immunity".

Subsequent to the receipt of the several depositions in evidence, and the completion of the arguments of respective counsel, the United States Commissioner ruled in favor of the demanding country—Canada—and stated that he would recommend extradition of these petitioners.

The extradition hearing was a joint one with respect to both petitioners. In the District Court, there were separate petitions and separate writs of habeas corpus. Otherwise, the proceedings were considered and disposed of as one. It was so continued on the appeal to the Circuit Court and is likewise so continued on this application.

The foregoing Writs were issued out of the United States District Court for the Eastern District of New York. Briefs on the behalves of these petitioners and likewise on behalf

of the respondents were submitted. After consideration, the District Judge dismissed the Writs (170 Fed. Supp. 506).

An appeal from the order dismissing these Writs was taken to the United States Circuit Court of Appeals for the Second Circuit. Here again, oral argument was had and briefs were submitted. Subsequently, the said Court affirmed the order so appealed from. An official copy of its opinion will be submitted with and made part of this petition.

Thereafter, a petition for rehearing was submitted to the said Circuit Court. That application was unopposed. It was, without opinion, denied by order dated August 3, 1959.

Hence, the instant petition for a Writ of Certiorari to the said United States Circuit Court for the Second Circuit to have its ruling reviewed by this Honorable Court.

The order appealed from to the Circuit Court in the body thereof, recited that the District Judge rendered his decision "upon the return to the Writs and the answer to the petition." Yet, neither the United States of America, nor the United States Attorney for the Eastern District of New York, took any interest or participated in the hearings before the United States Commissioner; no return was made to the writs of habeas corpus; neither served nor filed an answer to the relator-petitioner's petition upon which the aforesaid writs were issued and further, neither had any interest in the appeal to the Circuit Court and they did not participate therein. Neither did the prosecution serve or file any return to the writs or answers to the petitions for the Writs in the District Court. [Please see stipulation (dated March 17, 1959) to the foregoing effect signed by the attorneys for the respective parties to the proceedings in the District Court. This stipulation was joined in also by the United States attorney for the Eastern District of New York.]

The foregoing stipulation is set forth in "Appellants' Appendix" (p. 37a) printed separately and filed in the Circuit Court. This Appendix together with relator-petitioners' brief and reply brief and the appellees' brief in the Court below, will be submitted with this petition. There will also be submitted simultaneously herewith a copy of their printed petition for rehearing of the appeal in the Court below.

The petitioners respectfully request that the foregoing printed briefs, appendix and petition for rehearing be deemed part of this petition and be considered in connection with the disposition of this application.

CONTENTION NO. 1

The extradition proceedings conducted before the Commissioner are a nullity because of the failure of the prosecution to follow the prescribed statutory procedure therefor.

These extradition proceedings as already noted were based upon the provisions of the Treaty between Great Britain and the United States of 1842 and the several subsequent and supplementary conventions, the exemplified copy of the indictment, the complaint by Mr. Dreiband and the exemplified copies of depositions.

The procedure for extradition proceedings is prescribed by Section 3184, Title 18, United States Code.

It is there provided that:

> "• • • Commissioner • • • may, upon *complaint* made under oath, *charging* any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such Treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before

such Justice, Judge or Commissioner, to the end that the evidence of criminality may be heard and considered." (Emphasis supplied.)

The text of the foregoing statutory requirement is explicit. It specifies that the judicial officer—the Commissioner in this case—may proceed with a hearing *only* "upon a complaint * * * *charging* any person * * * with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention * * *."

The complaint sworn to by Mr. Dreiband in the instant case, beyond question, contains *no charges* of any kind against either of the petitioners with respect to any crimes as having been committed by them within the jurisdiction of such foreign government. Indeed, the complaint charges *nothing*—absolutely nothing—against either of the petitioners.

All that appears in the aforesaid complaint is a recital of what transpired in Canada, to wit: in paragraph 2, he states that on March 21, 1958, Justice of the Peace J. Little for the County of York, Province of Ontario, Canada, issued a warrant for the arrest of the petitioners for "theft of money and securities of the value of $960,000 obtained by deceit, falsehood or other fraudulent means, the property of Brilund Mines, Limited, a crime under the laws of Canada, pursuant to Criminal Code of Canada, being Chapter 51, 2-3 Eliz II, Statutes of Canada 1953-54 with amendments thereto, embodying Sections 269, etc., of the Criminal Code of Canada". In paragraph 3 of the said complaint appears a recital that on September 8, 1958, a true bill of indictment was handed up in the Supreme Court of Ontario, County of York, Province of Ontario, *charging* the petitioners "with theft, fraud and conspiracy."

The subsequent paragraphs of the aforesaid complaint contains a recital of Mr. Dreiband's authorization by the

Attorney General of the Province of Ontario to proceed with the extradition proceedings as "set forth in Section 3184 of Title 18, of the United States Code", and pursuant to the provisions of the Treaty between the United States and Canada.

In short, Mr. Dreiband has made in the complaint *no charges* of any kind against the petitioners.

Thus, the complaint is clearly defective and shows a total disregard of the statutory requirements specified in the aforesaid section, to wit: 3184, United States Code annotated.

Under the foregoing circumstances, the Commissioner definitely had no jurisdiction to proceed with the hearing.

Obviously then, since no charges against these petitioners were stated in the complaint upon which the extradition proceedings were based and heard, the Commissioner definitely lacked jurisdiction to conduct the hearing and much less—jurisdiction—for stating his opinion that extradition follow.

It is self-evident that a complaint containing *no charges*, is no complaint. Neither is a paper, called a complaint, reciting what happened in another country, and itself containing *no charges* against anyone, a complaint.

Therefore, in essence what transpired before the United States Commissioner, was a complete sham—a mockery and a waste of time for its participants.

Article X of the Treaty between Great Britain and the United States concluded in 1842 did not provide for extradition in cases of "theft" and "larceny". The subsequent supplementary conventions enlarged the types of crimes when extradition would be authorized and included among others, the crime of "larceny", * * * "knowing the same to have been * * * stolen":

The same subsequent and supplementary conventions provided that extradition under its provisions and of the foregoing Article X shall be carried in Her Majesty's Dominions and in the United States, respectively, *in conformity with the laws pertaining to extradition being enforced in the surrendering state.*

The extradition proceedings in the instant case, were not conducted in conformity with the Treaty provisions, the statutory requirements, and particularly the United States Code directive referred to above.

It must therefore be clear, and these petitioners so contend, that the extradition proceedings conducted by the Commissioner as herein outlined, devoid of a complaint containing charges, and so, not in accordance with the prescribed requirements of the aforesaid Section 3184, Title 18 United States Code, was a complete nullity.

United States courts and their Commissioners must comply with the specified requirements of the United States Code; otherwise their proceedings and those of their Commissioners are nullities and unenforceable.

CONTENTION NO. 2

The affirmance by the Circuit Court of the order of the District Court was in direct conflict with and in total disregard of the treaty provisions, the statutory requirements and the controlling decisions here applicable all in the face of the outstanding defects in the indictment and in the complaint and upon which the United States Commissioner conducted the extradition hearing—without jurisdiction.

It is a basic requirement of the law pertaining to extradition that when a demanding country has charged a defendant, as here, with the commission of a specific crime according to its statutes and seeks surrender of the person who it claims is guilty of such crime, that the

asylum country have a statute on its books similar to the one which the demanding country asserts the defendant is guilty of and which by comparison, would also appear to have been violated.

The Canadian Criminal Code with respect to "Theft" Section 269 thereof, under Sub-division 1, provides, after certain recitals, for the inclusion in the indictment of the words "with intent". These words are followed by the text also requiring in the indictment the recital of the *acts* and the several variations of "Theft" as defined under the aforesaid section.

With the opening paragraph of Section 1290 of the Penal Law of the State of New York relating to "Larceny" and before the several sub-divisions, the definition of "Larceny", is stated. This definition includes and also requires a recital in an indictment of the words, to wit: "with intent." This requirement is similar to the one specified under the Criminal Code of Canada, Section 269 thereof.

In the instant case, both the Canadian statute on which the indictments against these petitioners are based, the New York State Penal Law and the Code of Criminal Procedure, Section 276 (New York State), *specifically* require as an integral component of an indictment, the *allegations* of the *acts* constituting such crime to be recited therein and also allegations that the same were committed "with intent."

"Intent" must be alleged in the indictment since it is a necessary element.

Section 1290a of the New York State Penal Law specifies what by way of *pleading* should be contained in an indictment for "Larceny".

The latest case by the Court of Appeals of the State of New York—the highest judicial tribunal of the said State—decided April 16, 1959, *People* v. *McGuire*, reported in 5 New York (2nd Ed.), 523, at page 525, states:

"It is fundamental that an information *must state* the crime with which the defendant is charged and *the particular facts constituting that crime* (People v. Zambounis, 251 N. Y. 94; People v. Patrick, 175 Misc. 997). The degree of exactitude may well differ with the circumstances. For instance, when the information is used as a basis for obtaining a warrant for an arrest, mere hearsay unsupported by a sworn statement or an examination by the justice is not enough." (People v. Bertram, 302 N. Y. 526)."

The same decision at page 526, continues:

"but this presupposes an information clearly setting out the elements of the crime charged for the very good reason that *the defendant* '"*should be informed* of the nature of the charge against him and of *the act constituting it*, not only to enable him to prepare for trial, but also to prevent him from again being tried for the same offense"' (People v. Schultz, 301 N. Y. 495, 497), which, in the broad sense, is to say that *the crime charged should be stated with such accuracy* that the defendant may know the offense which it is claimed he has committed (People v. Love, 306 N. Y. 18)."

The same decision at page 526, continues further:

"People v. Paolillo (15 Misc. 2d 1031, aff'd 307 N. Y. 736) requires no different holding. Supplying an omission which in no way affects the obvious purport of the information is an entirely different situation from that where the omitted matter is essential to spell out the crime charged. The *particular acts constituting a crime are more than a technicality.* It is fundamental that a person accused of crime is not required to speculate as to what crime, if any, the information charges, for he is entitled to know in advance of trial what crime he is called upon to defend. *When the information fails to state facts sufficient to constitute the crime charged, it is jurisdictionally defective and must be dismissed.*"

So also held in:—

United States v. *Corbett*, 215 U. S. 233;
People v. *Adamchesky*, 184 Misc. 769, 55 N. Y. Supp. (2) 90; U. S. Code, 451.

Studying the first two counts of the indictments with which the United States Commissioner was concerned, as were, the Circuit Court of Appeals, the District Judge and as is presently this Honorable Court, we find therein the allegation of "with intent" as required by the aforementioned statutes, completely missing.

These extradition proceedings were initiated before the United States Commissioner upon the complaint of Mr. Dreiband, sworn to by him on the 26th day of September 1958. The complaint in turn was predicated upon the aforementioned defective indictment together with the several depositions and other exhibits.

The complaint referred to in the preceding paragraph was likewise jurisdictionally defective in that it also did not contain the allegation of "with intent", and further did *not* contain as is also required by the aforementioned statutes a recital of the *acts* allegedly committed by these petitioners and constituting the commission of the crime labeled against them in the indictment and likewise in the complaint.

Therefore, absent the words "with intent" both in the indictment and in the complaint, it must be definitely clear that the prosecution has completely failed to establish any basis for proof of "probable cause" with respect to the commission of the crimes *as charged* in the indictment against these two petitioners.

The case of:

People v. *Walrath*, 279 App. Div. 56 (1951),

clarifies the foregoing statutory requisites and clearly sustains the petitioners' contentions. There the Court, at page 56, said:

> "The existence of a criminal intent is a necessary ingredient of the crime of assault alleged in the indictment. *Whenever a specific intent is required by statute to constitute a crime, as in this case, such intent enters into the nature of the act itself and must be alleged and proved.* The criminal intent must be united with an overt act and they must concur in point of time. The law does not concern itself with mere guilty intention, unconnected with any overt act or outward manifestation. In the instant case there is neither proof of guilty intention nor of any overt act on the part of defendant." (Emphasis supplied.)

In the case of People on the complaint of *Kirchoff v. Fornaby*, 79 N. Y. S. (2nd) 153 (1946), the Court at page 154 said:

> "It should be emphasized, however, that the *People*, under well established rules of evidence, are *limited in the introduction of evidence by the allegation contained in the information.* How the People can prove a case against the defendants in view of these rules and the allegations set forth in the informations is difficult to conceive." (Emphasis supplied.)

Please see, also

> *Spiegel* v. *County Court of Kings County*, 129 N. Y. S. (2nd Ed.) 109 (1954) (not otherwise reported).

The foregoing concepts of the law are basic and plain. They apply with equal effect to indictments and informations as well as to complaints initiating a preliminary hearing, particularly so in the case of international extradition.

Consequently, the objections urged before the Commissioner at the several hearings as to "lack of jurisdiction" and "probable cause" by reason of the fatally defective and baseless indictment, the complaint and the receipt in

evidence of the insufficient depositions, were proper and wholly justified under the circumstances. Such objections should have been sustained.

Further, under the foregoing circumstances, there can be no valid and proper conclusion, regardless of the insufficient basis for proof of "probable cause" that there was reason to "believe" that these petitioners were guilty of the commission of the crimes as labelled (charged) *generally* against them.

In *Kalmanash* v. *Smith*, 241 N. Y. 142, it was held that allegations not supported by statements of ultimate fact and not showing specific *acts*, are conclusory and render the pleading fatally defective.

In *United States ex rel. Mayer* v. *Glass, United States Marshal* (1928), 25 Fed. (2nd Ed.) 941, this Honorable Court at page 943, said:

> "Clearly the indictment thus far recited would conform to the requirements of a criminal pleading for conspiracy at common law, but to comply with the statutory law of the United States in respect to such a pleading the draftsman *had to plead at least one overt act.*" (Emphasis supplied.)

To the same effect, please see *Gerdes* v. *Reynolds*, 181 N. Y. 180.

The Court in *People* v. *Foster*, 60 Misc. 3; 112 N. Y. Supp. 706, RULED that the phrase "Act constituting the crime," as used in Code Cr. Proc. § 275 (N. Y. State), requiring an indictment to contain "a plain and concise statement of the act constituting the crime," means a *statement of the manner* in which it (the crime) is alleged to have been committed. In the instant case, neither the indictment nor the complaint contain any such "statement of the manner, etc."

Please see, also,

Spiegel v. *County Court of Kings County*, 129 N. Y. Supp. (2nd Ed.) 109 (not otherwise reported).

After all, it makes for common sense and the law so prescribes that in the absence of appropriate allegations, *no* proof may properly be received with regard to what was not alleged, in civil cases and more particularly as here, in a criminal prosecution.

It thus clearly appears that the crimes *as charged* under Counts "1" and "2" of the indictment, in the instant case, are not provided for or contained anywhere in the quoted sections of the Canadian Criminal Code or for that matter in the quoted sections of the New York State Penal Law or the Code of Criminal Procedure of New York State, since all contemplate that the "crimes" so identified be committed "with intent."

The Treaties, Conventions and the various amendments thereto between Great Britain, Canada and the United States do *not* sanction the extradition of persons charged with the commission of crimes as set forth in Counts "1" and "2" of the instant indictment since *neither count has included therein*, the prescribed *charging* words: "with intent."

The Court of Appeals of the State of New York has ruled that when particular or specific "intent" *is* essential to and *is* the gist of offense, as here, *it is necessary to allege "intent" with distinctness and precision*, and to support such allegation by proof.

Please see:

People v. *Santoro*, 229 N. Y. 277;
People v. *Weiss*, 252 App. Div. 463, 300 N. Y. S. 249, reversed on other grounds.

Conclusions of fact, if so broad as not to necessarily pre-suppose criminal act, or *leaving intent to speculation, are insufficient for indictment*, and conclusions of law, standing alone, are not sufficient.

So held in:

United States v. *Corbett*, *supra*;
People v. *Adamchesky*, *supra*;
United States Code § 451;
People v. *Butler*, 133 Misc. 658, 233 N. Y. Supp. 656.

CONTENTION NO. 3

No acts are alleged in the indictment nor in the complaint—a necessary component to constitute the crime of "theft" or "larceny".

We have referred above to the statutory requirements under the Canadian Criminal Code; the Penal Law of the State of New York and the Code of Criminal Procedure (New York State) for a valid and subsisting indictment and what the necessary ingredients and allegations therefor, are.

"Theft" and "Larceny" are the general headings. The *acts*, under this general heading, allegedly committed by the defendants to be charged in the indictment, *must* be set forth concisely and plainly. This is a statutory requirement. It is for the definite purpose of apprising the accused "with reasonable certainty" of the nature of the accusation against him "to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense." *United States* v. *Simmons*, 96 U. S. 360.

The indictment (Counts No. 1 and No. 2) in the case at bar is completely barren of any recital of *any* act, allegedly committed by these petitioners constituting either the

crime of "Theft" or "Larceny" as defined by the statutes heretofore referred to.

Therefore, by reason of the definatory text, referred to above, it follows as a matter of law, that the indictment and complaint here cannot be sustained as valid since they do *not* recite the charge nor any *specific* acts constituting the alleged crime, committed in violation of said statutes and which had been committed "with intent". Absent such recitals, the indictment is rendered faulty and cannot sustain the Commissioner's ruling recommending "extradition" or even his purported finding of "probable cause." The indictments here lack the foregoing specifications.

> *Kalmanash* v. *Smith*, 291 N. Y. 142;
> *Gerdes* v. *Reynolds*, 281 N. Y. 180;
> *People* v. *Foster*, 60 Misc. 3, 112 N. Y. S., p. 706;
> *Spiegel* v. *County Court of Kings County*, 129 N. Y. Supp. (2nd Ed.) 109 (not otherwise reported).

Capone v. *United States*, 56 F. (2) 927, further sustains the petitioners' contentions. There, at page 930, the Court said:

> "In interpreting these constitutional provisions, Courts have quite generally held that where the offense is purely statutory, having no relation to common law, it is as a general rule, sufficient in the indictment to charge the defendant *with acts* coming fully within the statutory description in the substantial words of the statute without any further expansion of the matter; but it is also true that *the accused must be apprised by the indictment*, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent protection for the same offense. United States vs. Simmons, 96 U. S. 360." (Emphasis supplied.)

In *People* v. *Farson*, 244 N. Y. 413, the Court said:

> "In drafting *an indictment*, it is sufficient to follow the statutory language, if *it* contains all that *is essential* to constitute the crime and *apprise the accused of the nature of the crime charged.*" (Emphasis supplied.)

In *People* v. *Dwyer*, 160 App. Div. 542, McLaughlin, *J.*, at page 547, said:

> "It is not necessary that the section of the statute under which the prosecution is being conducted should be named in the indictment. *All that need be alleged in an indictment*, and proved at the trial *are the specific facts* which bring any given case within the statute. (People v. Miller, 143 App. Div. 251; aff'd 202 N. Y. 618)." (Emphasis supplied.)

Further, in *People* v. *Dillard*, 163 Misc. 146, the Court at page 150, said:

> "Under the general rule relating to statutory misdemeanors, it is well settled that *setting out the facts* constituting the crime in the words of the statutes, besides an averment as to time, place, person and other circumstances to identify the particular transactions complained of, meets all the requirements (People v. West, 106 N. Y. 293, 295; see also People v. Farson, 244 id. 413, 417)." (Emphasis supplied.)

The Court in *Pierce* v. *Creecy*, 210 U. S. 387, at page 395, said:

> "The validity of the warrant on which the appellant was arrested depends upon the substantial sufficiency of the indictment on which it was based. Unless that indictment, when tested as on motion in arrest of judgment, is capable of supporting a conviction, the requirements of the Constitution are not fulfilled and the extradition is unauthorized."

So here too, both the indictment and the complaint are clearly insufficient, as a matter of law. And, extradition is wholly unauthorized.

CONTENTION NO. 4

The sufficiency of an indictment or the complaint may be challenged at any time, even on appeal, in the absence of a plea of guilty.

In the instant case, neither of these petitioners have entered any plea in Canada to the so-called indictments here involved.

Therefore their attack and challenge to its sufficiency is timely.

This same principle applies to the complaint.

So held in:

People v. *Paolillo*, 132 N. Y. Supp. (2 Ed.) 161.

CONTENTION NO. 5

These petitioners were completely uninformed of the accusations against them and were thus deprived of their constitutional right of being advised as to the "acts" allegedly committed by them constituting the crimes as labeled in the indictment and likewise as labeled in the complaint.

The defects and omissions with respect to the insufficiency of the indictments and the complaint against the petitioners particularly the omission of any recital of any *act* or acts on their part, constituting the alleged crimes of "Theft" or "Larceny" have already been pointed out above.

Because of such defective state of the pleadings—the indictment and the complaint—due to the omission therefrom of the required "with intent" and of the failure to recite the "acts" allegedly committed by *these petitioners* as constituting the crimes charged against them, they *were*

not fully informed of the "acts" charged against them. Under such circumstances, they were not required to and could not interpose defensive testimony *obviously* "not knowing" what they were called upon to meet.

People v. *Schultz*, 301 N. Y. 495 (1950);
People v. *Romano*, 111 N. Y. S. (2nd) 234 (1952);
People v. *Newman*, 190 Misc. 143 (1947).

These petitioners appreciate that in the main, their contentions may be regarded as technical.

It is an elementary principle of law that technicalities are permissible and recognized by law. Indeed, the courts are in duty bound to sustain them when timely and properly urged. We here have technicalities but substantial ones going to the very core of the baseless charges. *They are fundamental and basic* and may not be ignored.

Please see:

People v. *Romano* (*supra*).

In the case of *People* v. *Staples*, 162 N. Y. Supp. (2nd Ed.) 131 (1957), the Court, at page 133, said:

> [2, 3] " * * * The defendant should be informed of the nature of the charge against him and of the act constituting it, not only to enable him to prepare for trial, but also to prevent him from being tried for the same offense. * * * *The requirement* that an indictment and an information must state the crime with which a defendant is charged, and the particular acts constituting that crime is more than a technicality, it *is a fundamental, a basic principle of justice and fair dealing*, as well as a rule of law." *People* v. *Schultz*, 301 N. Y. 495, 95 N. E. 2d 815, 816.
>
> "The information *must* set forth the specific acts constituting the alleged offense and may not leave them to be supplied by conjection. People v. De Gironimo, 172 Misc. 1100, 15 N. Y. S. 2d 1017. Nor can the information state mere conclusions. People v. Kasloff, Co. Ct., 54 N. Y. S. 2d 455. *Defi-*

ciencies in informations cannot be supplied by recourse to depositions, affidavits or testimony. People v. Patrick, 175 Misc. 997, 26 N. Y. S. 2d 183; People v. Grogan, 260 N. Y. 138, 183 N. E. 273, 86 A. L. R. 1266.

The settled rule of criminal pleadings requires that ALL the elements which enter into the definition of the offense *must* be stated. (The strictness which formerly prevailed in respect to non-essential matters has been relaxed, but *the rule that the offense must be charged* in plain intelligible language and that all the essential elements of the crime must be alleged, *has not been relaxed.*) It has been preserved for the protection of the accused, and to promote the certain and orderly administration of the criminal law. People v. Patrick, 175 Misc. 997, 26 N. Y. S. 2d 183.

[6] Without a proper information, no crime was charged, the justice court could not acquire jurisdiction, and consequently there can be no conviction. People v. Winston, 155 App. Div. 907, 139 N. Y. S. 1072." (Emphasis supplied.)

To the same effect, please see:

People v. *Wojcinski,* 159 N. Y. Supp. (2nd Ed.) 539 (1957).

Thus, in the light of the foregoing judicial pronouncements, even the Justice of the Peace in Canada had no jurisdiction to issue the warrant against these petitioners.

Petitioners properly and consistently complained and objected before the United States Commissioner at the hearings, with respect to the foregoing omissions and the lack of any information to guide the defense.

Indeed, the Commissioner, according to the record, was himself unadvised. And counsel for the prosecution (the Canadian Government) was non-committal, either because being uninformed himself or else, because of embarrassment handling a prosecution without any valid basis there-

for—the defective and insufficient indictments and the baseless and vague complaint.

We respectfully refer this Honorable Court to the pages of the transcribed record of the hearing before the United States Commissioner for the colloquies, objections and comment of petitioners' counsel concerning the lack of information as to the alleged criminal charges and "acts" of the petitioners at pages 7, 55, 56, 64, 65, 66, 68, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 114, 127, 174 and 186.

In *Pierce* v. *Creecy*, 210 U. S. 387, the Court, at page 397, said:

> "The indictment fails to inform appellant of the charge against him with that degree of reasonable certainty which will enable him to prepare his defense."

The foregoing excerpt is especially apropos to the instant situation.

To the same effect, please see:

> *United States* v. *Simmons*, 96 U. S. 360;
> *Capone* v. *United States*, 56 F. (2) 927;
> *People* v. *Farson*, 244 N. Y. 413.

For an excellent description and analysis of what a valid indictment should contain, we respectfully offer the decision of the Court of Appeals of the State of New York, in *People* v. *Corabalis*, 178 N. Y. 516, where Parker, Ch. J. at page 519, said:

> "The demurrer to the indictment contains the following, among other grounds: 'The indictment does not conform to the requirements of sections 275 and 276 of the Code of Criminal Procedure in that it does not contain a plain and concise statement of the acts constituting the crime.' This court considers those sections of the Code in People v. Dumar (106 N. Y. 502), and reaches the conclusion that *an in-*

dictment must charge both the crime and the act constituting it, and that the omission of either is fatal. In the course of the opinion, written by Judge Danforth, it is said: 'If there was no accusation of crime, the paper, however formal in other respects, would not be an indictment, and so there would be no criminal action. *If it contained no statement of the act constituting the crime there would be no description of the offense,* and neither an acquittal nor a conviction would enable the defendant to withstand a further prosecution for the same crime. Moreover, the plain words of the statute, as well as its object, would be disregarded; for the manifest intention of the legislature in requiring the indictment to state the act constituting the crime was, among other things, *that the accused should learn from it what he was called upon to defend.* The form of the indictment given in the Code (§ 276) leads to the same conclusion.'

The view thus expressed has been cited with approval many times in this court, and recently in the following cases, among others: People v. Peckens (153 N. Y. 576, 586); People v. Willis (158 N. Y. 392, 396); People v. Klipfel (160 N. Y. 371, 374); People v. Kane (161 N. Y. 380, 386).

The latter case quotes with approval the language employed by Judge Andrews in People v. Albow (140 N. Y. 130, 134): 'The rule that the offense must be charged in plain and intelligible language, and that the indictment must set forth *all* the essential elements of the crime, is and ought to be preserved alike for the protection of the accused and in the interest of the certain and orderly administration of the criminal law.'

In People v. Helmer (154 N. Y. 596, 600) Judge Martin writing, it is said: *'The purpose of an indictment is to identify the charge against a defendant,* so that his conviction or acquittal may inure to his subsequent protection, *and to apprise him of the nature and character of the offense charged and of the facts which may be proved, so as to enable him to prepare his defense.'*

Judge O'Brien expresses it in briefer form in People v. Willis (158 N. Y. 392, 396: cited *supra*):

'An indictment is now good if it contains sufficient averments to inform the defendant of the nature of the accusation against him and enables him to prepare his defense.'

These decisions establish that the object of the legislature—in requiring that in addition to charging the crime *the indictment must contain a plain and concise statement of the act constituting the crime*—is twofold: *First*, to enable a defendant to prepare his defense; *second*, to prevent a second indictment for the same offense." (Emphasis supplied.)

And if perchance, the thought be suggested that because of the absence of the recital in the indictment, presently challenged, of "with intent" and of "acts" and the like, that a motion be made in the foreign jurisdiction, for a bill of particulars, then we offer the following answer, again quoting from the same excellent decision in *People* v. *Corabdis* (*supra*):

"The learned judge who wrote the opinion of the Appellate Division appreciated the force of the argument of defendants that it is impossible under such an indictment for the accused to properly prepare for trial, but he suggested that defendants could be relieved from this embarrassment by making a motion for a bill of particulars. The difficulty with that remedy is that whether a bill of particulars shall be granted or not rests in the discretion of the court. A motion may be made, it is true; but it need not be granted. Hence *it is the duty of the courts to see to it that* the right which the legislature has accorded to a citizen accused of crime to have *the indictment state the acts* constituting the crime so that he may prepare his defense, and be protected against further prosecution, be not frittered away by holding that the requirement of the statute will not be insisted upon, and *that upon defendant will be placed the burden of ascertaining*, if he can, by a motion for a bill of particulars, addressed to the discretion of the court, *what particular act or acts* the People claim make out the crime charged." (Emphasis supplied.)

Under the circumstances, the conclusion is inevitable that there was and is a complete failure to disclose the *specific* basic accusations of "with intent" and a recital of alleged "acts" and also of proof as to "probable cause" with respect to the alleged commission by these petitioners in Canada of any crime which violated the provisions of the Criminal Code of Canada, particularly Section 269 thereof or any Criminal Code and especially Sections 1290 and 1290a of the Penal Law of the State of New York.

The prosecution has here failed to submit to the Court (Commissioner) the evidence upon which the said Justice of the Peace acted and to establish that he was justified in the issuance of the warrants of arrest against the petitioners and that he (the Justice) acted in compliance with statutory authority.

In fact, considering the entire record, it can reasonably be urged that the Justice of the Peace in Canada, had nothing before him (by way of proof of any criminal offenses against these petitioners) when he issued the warrants.

Thus, in the light of the exposé under this contention, we respectfully submit that it is abundantly clear that these petitioners were completely *uninformed* of the purported accusations against them within the intendments of the Treaty provisions, the subsequent and supplementary conventions, the decisions of this Honorable Court, those of lower courts mentioned herein, the statutory provisions of the Penal Laws of the State of New York, the Code of Criminal Procedure of the same State and *particularly*, the Sixth Amendment of the United States Constitution.

CONTENTION NO. 6

These petitioners were definitely prejudiced by the failure of the prosecution to have set forth in the *indictments* and likewise in the *complaint* any "acts" constituting the crimes charged against them.

The failure by the prosecution to set forth any "acts" in the indictment and likewise in the complaint, deprived the petitioners of "knowledge" and "information" with respect to such acts. Thereby the petitioners were not in a position, lacking such knowledge, to offer any defensive testimony.

Defensive testimony may be received at extradition proceedings and that type of defensive testimony is definitely different from the testimony of a defense at a trial upon the merits.

"Acts" and specifications with respect thereto are required to be incorporated in the indictment and in the complaint by "a plain and concise statement of the acts constituting the crime."

With respect to the foregoing, we respectfully refer this Honorable Court to the citations of authority hereinabove mentioned (pp. 15-29).

It is an elementary principle of law in civil litigation and particularly in criminal prosecutions, that the duty of going forward with the evidence is on the part of the complainant. No "acts" constituting the crimes charged having been set forth in the indictment, *no* proof could properly be received to support the alleged crime. Indeed, no such proof was offered or even attempted before the United States Commissioner. Therefore these petitioners were not called upon or in duty bound to offer any "defensive testimony", since they were completely *uninformed*, as has already heretofore been demonstrated.

Defensive testimony is authorized not only by the decisions but also by Congressional legislation.

Defensive Testimony. Pursuant to the provisions of *Section Three* of the *Act of Congress of August 3, 1882, a fugitive is regarded as entitled to call witnesses in his own behalf and to testify himself, if he so desires.*

CONTENTION NO. 7

The Court below totally disregarded the petitioners' contention of the complete omission from the indictment and likewise from the complaint of a statement as to the "value" of the *quid pro quo* for the Canadian transaction.

It was ruled:

> "In Peo. v. Nighie, 66 Barb. 131, that positive averment of value in indictment is necessary in those cases where value is an ingredient of the offense, as in grand and petit larceny."

And, in the instant case, "value" is an ingredient of the crimes charged against these petitioners. Its omission from the indictment rendered the same defective."

The complaint based upon the aforesaid defective indictment, was likewise defective and failed. Thus they created a lack of jurisdiction for the Commissioner to function.

Aside from the fact that these petitioners urge that the United States Commissioner and the Courts below completely disregarded the treaty provisions, the controlling decisions and statutory requirements of the State of New York pertaining to the crimes of theft, larceny and fraud and deceit, they further urge that the United States Circuit Court of Appeals in affirming the order of the District Court, was (just as the District Court) *misled*

by statements and representations made by the respondents (appellees) in their brief in that Court, to the effect, that there was evidence submitted to the Grand Jury in Canada that the value of the Stuart "property claims" was less than $1,000.

The ruling of the Circuit Court referred to above, is clearly erroneous.

The hearing before the Commissioner was based upon the defective complaint sworn to by Mr. Dreiband. The evidence received by the Commissioner consisted of an exemplified copy of the Canadian indictment, the aforesaid complaint and several depositions, among which was one by a B. W. Chechak, a consulting geologist.

The prosecution contended before the Commissioner and likewise urged in the District Court and again in the Circuit Court, that the Chechak deposition established that the "value" of the Stuart "property claims" was less than $1,000, and that therefore the *quid pro quo* for the $960,000 paid by Brilund Mines, Ltd., for the "property claims", was insufficient.

The Chechak deposition (1958) attempted to explain his (Chechak's) prior recommendations to Brilund Mines, Ltd. to purchase Stuart's "Molybdenum" and "Copper" properties. These recommendations were contained in Chechak's written report dated April 29, 1957, referred to in his deposition. (Please see photostat exhibit, Chechak report attached at the end of this petition, page 44).

The aforesaid 1957 report was one of the motivating causes for Brilund Mines, Ltd., to act expeditiously; it was alluring, particularly, taken as it was, in conjunction with the numerous representations by Stuart and other simultaneous factors referred to in the depositions of Wallace, Bauman and Ian Smith.

This 1957 report to Brilund Mines, Ltd., is referred to on page 1 of Mr. Chechak's deposition of 1958 (the tenth

page of the series of depositions) as well as elsewhere in the depositions submitted by the appellees.

The photostat copy of the exhibit report, as submitted to the Circuit Court which had been received in evidence, before the Commissioner was indistinct and not readily readable. At the end of this petition there is now attached and made a part hereof, a clearer and readable photostat copy of that same report—page 44.

Mr. Chechak therein did not evaluate the properties. He merely observed that for surveyors and linesmen *to set out the boundaries* of the 840 acres, the cost would be less than $1,000.

In this same 1958 deposition to the Canadian authorities, Mr. Chechak did not repudiate his earlier report of April 1957 to Brilund Mines, Ltd. He did not say that the petitioners or that the Board of Directors of Brilund Mines, Ltd., had ordered a report to sustain the purchase. He did not deny the existence of "molybdenum" or of "copper" in substantial commercial quantities and quality on the properties of the Stuart claims. He did not deny the existence of a breciated rhyolite or a strong fault on the Verna Lake side. (A fault is a break in the terrain in which ore is usually found.) He did not deny that several producing contiguous mines established their profitable operation thereon; nor that these minerals were extremely vital to the steel and electrical industries. Mr. Chechak did not deny in his later deposition of 1958 that these properties might be capable of "yielding $80. per ton" to Brilund Mines, Ltd.

(Please see deposition of Ian Smith where the above is stated.)

In fact, Mr. Chechak admitted in his 1958 deposition that he knew Charles Stuart had *theretofore* been offering these same properties for sale direct to Brilund Mines, Ltd., and that his (Chechak's) report was to be used in connection therewith for the purpose of inducing a purchase.

Furthermore, in his (Chechak's) deposition of 1958 to the Canadian authorities in attempting to explain his "recommending" report of April 1957 to Brilund Mines, Ltd., Mr. Chechak did not deny:

1) that samples taken from the Larder Lake properties assayed 2.29 per cent Molybdenum plus 3.33 per cent copper—an unusual yield;

2) that extensive exploration, testing and drilling had previously been undertaken by other Canadian interests;

3) that surveys indicated several strong zones running for great lengths with widths running over 100 feet samples of which gave the aforesaid excellent values;

4) that a firm market existed in April 1957 for Molybdenite at $1.18 per pound; and

5) that Molybdenite of Canada, one of the world's largest producers operated most profitably with a small ore tonnage grading under ½ per cent molybdenite.

On the contrary, Mr. Chechak in his aforesaid April 1957 report, *recommending* the purchase to Brilund Mines, Ltd., stated that the Charles Stuart properties had substantial possibilities for investment and exploration.

In the light of this April 1957 report and the attendant circumstances, the United States Commissioner expressed grave doubt and concern as to the reliability of the later self serving deposition made by Mr. Chechak in 1958—almost a full year *after* his prior recommending report.

Indeed, the record itself recites that the Commissioner himself expressed the view that what had been submitted to him by way of evidence was very weak and that he was accepting the deposition of Mr. Chechak, "hesitatingly."

Based upon the foregoing exposé as to the contents of the Chechak deposition and his report, it is now definitely apparent that the statement in respondents' (appellees') brief in the District Court and again repeated in their brief in the Circuit Court that the *value* of these "property claims" was less than $1,000 is indisputably incorrect and was thus misleading.

Therefore, in the absence of proper allegations of "value" and "knowledge," the indictments as well as the complaint referred to above, are fatally defective.

It is an elementary principle of law and particularly in criminal litigation where the crime of "theft" as Canadian law labels it and as the New York State Penal Law labels it as "larceny", that evidence of "value" must be pleaded (1) in the indictment, and also (2) in the complaint where extradition is sought.

Thus, in view of the foregoing, neither the indictment nor the complaint as submitted to the Commissioner afforded him jurisdiction to hear and rule. Consequently, upon this point alone, the entire extradition proceedings failed.

CONTENTION NO. 8

The conclusion in the indictment in Count 2 thereof that these petitioners committed "fraud and deceit" is wholly unsupported by any competent proof.

The deposition (by Mr. Ian Smith), in evidence before the United States Commissioner discloses that corporate meetings of Brilund Mines, Limited were duly held and that its Board of Directors approved the transaction with Stuart and authorized its completion.

The Courts have held that even if the approval or consent to the transaction involved, were obtained by fraud,

there can be no "theft" as Canada calls it, or "larceny" as defined by the New York State Penal Law.

That was the ruling in the following cases:

15 S. & R. 93;
9 C. & P. 741;
7 Cox Cr. Case No. 289.

Indeed, the Courts have uniformly held that where corporate authorization had been given to the officers, as here, to complete the transactions and the officers had acted under a bona fide claim of right to complete the same, also as here, that then there can be no larceny.

So held in 4 Col. 182.

It has similarly been held in 25 Tex. App. 333; 79 Ga. 564; 25 Neb. 444; 24 Fla. 358 that one is not guilty of larceny * * * in taking property *if he was of the belief that he had a right to do so.*

The record here clearly establishes that the petitioners had an absolute right to such belief.

Since, therefore, corporate authorization to complete the transactions referred to had been obtained prior to such completion, the conclusion is inevitable that these petitioners together with their co-defendant, Mr. Schoenbrun, believed, as they had a right to do, under the existing circumstances, that they had been duly authorized to complete the obligations under the written contracts. Hence, no larceny may properly be charged against these petitioners or the co-defendants.

It was been held in 44 Ala. 396; 55 Ill. 854; 108 Mo. 611; 34 Neb. 250; 24 Tex. App. 35; 95 Col. 227, that the mere unlawful taking and carrying away of property of another is not larceny *unless* it is done with "criminal intent" or *animo furandi.*

In the instant case as we have already pointed out, there is no charge or specification (against these petitioners) of "acts" done "with intent", criminal or otherwise.

Thus, there was no "probable cause" for the United States Commissioner to pass upon and besides, under the circumstances, he clearly lacked jurisdiction as has already been demonstrated.

CONTENTION NO. 9

The indictment is further defective because of complete indefiniteness as to place, date and time of the alleged commission of the purported crimes.

The indictment in the first and second paragraphs thereof, after labeling the purported crimes states that the same were committed "during the year 1957". The foregoing recital as to the time of the commission of the labeled crimes is clearly indefinite because it does not set forth *specifically* the date, place and time of the purported commission of such purported crimes so as to fully inform these petitioners as to the time of the alleged misdeeds.

This omission as to the place, date and time when the alleged crime was committed deprived the petitioners of knowledge "to the end that he may prepare his defense and plead the judgmnt as a bar to any subsequent prosecution for the same offense."

U. S. v. *Simmons*, 96 U. S. 360.

The failure to disclose the date and time of the commission of the alleged crime charged against these petitioners, did not afford them a proper opportunity to start the period running so as to "plead the judgment as a bar to any subsequent prosecution for the same offense."

U. S. v. *Simmons* (*supra*).

The court in *State of Vermont* v. *O'Keefe*, 41 Ver. R. 691, Steele, *J.*, at page 694, said:

> "It is a fundamental rule of criminal pleading that the *material facts must be averred in the com-*

> ***plaint or indictment with certainty as to time and place*** * * * To constitute a sufficient averment, ***the year, month and day must be particularly stated,*** and uncertainty in either of these respects is a defect not cured by verdict." (Emphasis supplied.)

In *People* v. *Cucciara*, 209 App. Div. 326 (1924), the Court at page 327, said:

> "It is true that the indictment should state distinctly the crime charged and with reasonable certainty the time and place of commission. The language should be plain and intelligible to the ordinary mind."

It should be understandable that if claims were made that the alleged crime was committed at the beginning of the year 1957 and a subsequent indictment for the same offense were to be found later on, specifying its commission the latter part of the year 1957, then these petitioners would have had the opportunity of knowing the date when it was claimed that the prior offense was committed and thus be in a position to assert a prior disposition thereof as a bar to such subsequent indictment.

In the case of *United States* v. *Winslow*, Case No. 16742 (District Court of Oregon) the Court there said:

> "Every indictment *must* allege a day and a year certain on which the offense was committed. 1 Bist Cr. Law § 239 * * *. An allegation that a crime was committed 'on or about' a certain day, does not show but that the action is barred by lapse of time." (Emphasis supplied.)

The foregoing citations render the indictment completely defective. That being so, and bearing in mind the petitioners' comments with respect to the complaint as set forth above, it follows that the said complaint upon which the Commissioner conducted these extradition proceedings, is ineffectual.

The indictments in the instant case recited no month nor date of the commission of the alleged crimes.

Since, the indictment, which was the basis for the complaint, falls, then the complaint also falls. Therefore, there is nothing to sustain the extradition proceedings which the United States Commissioner conducted.

CONTENTION NO. 10

There was no proof before the United States Commissioner to sustain his finding of "probable cause" and besides, the Commissioner lacked jurisdiction to entertain and rule in the extradition proceedings.

The *Canadian decisions* as well as those of this jurisdiction and including those of the United States Supreme Court, hold that where the document which is called an indictment does not specify the "acts" which the prosecution claims the accused committed and also allege that the same were done "with intent", then the so-called indictment is fatally defective; and being so, it (the so-called indictment) is not merely voidable but *is absolutely void.*

It is understandable, of course, and should need no further persuasion that when an indictment is void, *it is no indictment.*

Since the document which the prosecution here calls an indictment is not an indictment, then it follows that the prosecution has absolutely no claim or right to demand the extradition of the petitioners.

And, since what the prosecution here calls an indictment, is no indictment, then it follows as a natural corollary that the complaint has no valid support.

"Probable cause" was the chief concern of the Court. It is difficult to understand how the Commissioner or even the District Judge could consider and rule upon "probable cause" when *there is no valid basic indictment or complaint* against these petitioners. Absent a valid indictment and complaint, there can be no issue of "probable cause." And since, under the circumstances, there was no issue of "probable cause", no evidence of any kind with

respect to "Probable Cause" could properly have been received by the Commissioner, even if attempted.

"Probable cause" is what the Commissioner was called upon to rule, and missing the point, because of lack of a valid indictment, a valid complaint and proper proof, his ruling was and is definitely unsupported legally as well as factually.

Therefore, upon the face of all the documents produced by the prosecution and received in evidence, and particularly the document called an indictment, it definitely appears that no extraditable offense has been established nor charged nor have any "acts" been asserted against these petitioners as having been committed by them in accord with the definitions and statutory specifications contained in Section 269 of the Canadian Criminal Code, Sections 1290 and 1290a of the New York State Penal Law and Section 276 of the Code of Criminal Procedure of the State of New York.

Consequently, in view of the foregoing statutory requirements and the failure by the prosecution to comply with them and in the light of the controlling decisions cited herein, together with the absence of legal proof of an extraditable offense committed by the petitioners, the Commissioner completely lacked jurisdiction to make the ruling he did.

CONTENTION NO. 11

The statements and conclusions contained in the opinion of the Circuit Court of Appeals are unsupported and in conflict with the record and documentary evidence.

On page 1716 of the opinion (p. 55), the learned Circuit Court of Appeals concluded that the evidence before the Commissioner was sufficient to satisfy the treaty requirements of production of evidence by the government of Canada adequate to furnish reasonable ground for the belief that these petitioners had committed within the Dominion of

Canada, acts constituting a criminal offense under the laws of Canada and under the laws of New York.

It is clear, however, that the Circuit Court was definitely misled in construing the deposition of Mr. Chechak taken in March 1958 in the light of the contents of his report dated April 29, 1957 (please see photostat copy of said report at the end hereof, p. 44).

These petitioners have analyzed herein the several discrepancies in the statement contained in Mr. Chechak's deposition and his report on pages 31-35 hereof. No further comment with respect thereto will be made.

Again, on page 117 (R 56) of the same opinion of the Circuit Court of Appeals, appears the conclusion that the depositions in evidence before the Commissioner "reveal that one could reasonably believe that relators (petitioners) and their associates acting ostensibly as officers and directors of Brilund Mines, Limited, purchased with $960,000 worth of assets of that corporation from one D. Charles Stuart real property probably known by him to be of an estimated value of less than $1,000."

The conclusion as contained in the foregoing quotation is not justified nor can it be sustained because of the absence of (a) an allegation or statement in such depositions that Stuart's "property claims" were of a specific value, and (b) an allegation or statement in such depositions that *these* two petitioners had knowledge of such estimated value being less than $1,000.

An observation merely that Stuart "probably" knew the real property "to be of an estimated value less than $1,000", does not and cannot charge these petitioners with such "probable" knowledge or the probability of having such knowledge.

These petitioners are here being charged with having committed crimes. "Probabilities" and what "one could reasonably believe" are speculations. Speculations are

not sanctioned in criminal law, whether it be in Canada, the United States and particularly. New York State.

People v. *Corabalis*, 178 N. Y. 516, 520;
People v. *Kane*, 161 N. Y. 380;
People v. *Butler*, 133 Misc. 658.

The holdings of the Circuit Court as quoted above are clearly in conflict and inconsistent with the evidence as produced and cannot be justified or sustained since there is absolutely no proof of any kind in the record as to "value" of the Stuart "property claims."

Please see:

Hedges v. *Roach*, 16 Neb. 673;
Dreben v. *Belloise*, 275 App. Div. 755, 87 N. Y. Supp. (2 ed.) 572;
Ebenstein v. *Pritch*, 275 App. Div. 256, 89 N. Y. Supp. (2 ed.) 282;
Lee v. *Douglas, Gibbons & Co.*, 258 App. Div. 717, 14 N. Y. Supp. (2 ed.) 938;
Sutrone v. *Kelly*, 68 N. Y. Supp. (2 ed.) 878.

We pointed out above, that there was absolutely nothing set forth either in the indictment or in the complaint of any "value" for the Stuart "property claims".

Furthermore, the statement by the lower Court that these petitioners had "knowledge" that such "estimated value" was less than $1,000 is in conflict with the holding of the Commissioner.

Further, there is no statement, either in the indictment, the complaint or in any of the depositions attributing such "knowledge" to either of these petitioners.

The law, even in extradition proceedings, requires such proof as an element to sustain "probable cause" which was the chief concern of the Commissioner.

Towards the end of the opinion of the Circuit Court of Appeals, the conclusion is expressed that the criminal intent required by both the Canadian and New York

statutes is necessarily involved in the charges as alleged and need not be set out *in haec verba*. This ruling is in direct conflict with the requirements of both the Canadian and the New York statutes.

The recognized and established rulings of the cases are all to the effect that criminal "intent" must be set forth in the indictment *in haec verba*.

The decisions also require a recital in the indictment that the "acts" constituting the crime charged against a defendant *must* likewise be recited therein.

These petitioners have already referred to this latter erroneous ruling of the Circuit Court of Appeals between pages 40 and 42 hereof. No further comment with regard thereto will presently be made.

Conclusion

By force of the analysis of the record and the attendant circumstances as outlined herein, and the questions to be presented for review hereto attached (pp. 47-49), in the light of the Treaty provisions, conventions and amendments thereto, statutes and the controlling Court decisions, it is respectfully submitted that this petition be granted and that the Writ of Certiorari prayed for be granted to the end that the decision and judgment of the United States Circuit Court of Appeals for the Second Circuit be reviewed by this Honorable Court.

Respectfully submitted,

MAX J. LEBOYER,
Attorney for Relators-Petitioners.

Certificate of Counsel

MAX J. LEBOYER, attorney for the above-named petitioners does hereby certify that the foregoing petition is presented in good faith and not for delay.

MAX J. LEBOYER,
Attorney for Petitioners.

Letter Exhibit (Checkak)

(See opposite ☛)

LETTER EXHIBIT (CHECHAK)

[illegible] Ann Street

[illegible] Ontario

[illegible] Mines Limited

Room 414 [illegible] Welling on Street W.

[illegible] Ontario

Dear Sir :

Several years ago the writer had the opportunity of visiting the Verna Lake area.

From a study of the aeromagnetic data the area is considered to be particularly attractive prospecting ground. Several reconnaissance traverses were made in those areas of special geophysical interest. Numerous exposures of well pyritized basalt and related rhyolite pyroclastic flows were observed and are principally located along a height of land extending from about one mile south of Mary Lake in Ben Nevis Twp. to Clifford Twp along a strike direction of S 60 degrees west. The widespread nature of the pyritization in the area is further illustrated by an occurrence of rusted schist one mile west of Mt. Cordelia south of Verna Lake in Ben Nevis Twp.

A strong fault striking N 45 to 50 degrees east is responsible for the rugged shoreline of Verna Lake. An exposure of diabase on the south shore of this lake strikes N 45 degrees west. A second exposure of this rock occurs on the township line (Clifford - Ben Nevis) one mile north of Verna Lake. Other important mines are known to be located along or adjacent to such dykes (Quemont, Normetal etc.).

Recently I was shown samples of fragmental rhyolite flecked with chalcopyrite and finely impregnated with molybdenite. These were reported to have come from a showing 12 feet wide and 125 feet long, striking about S 70 degrees west, and centering about claims t336 to t341 inclusive of Clifford Twp. A sample representing a 12 foot width was reported to assay 1.5 % copper and 2.74 % Mo. At current metal prices this represents an attractive ore grade. Molybdenum is generally associated with acid intrusives. An intrusive of quartz feldspar porphyry occurs some distance to the southwest of the property in Clifford Twp.

It is recommended that the property be acquired and examined in detail by a competent geologist at the earliest opportunity.

Respectfully submitted

April 29,1957.

B.W. Chechak B.Sc.

Consulting Geologist

United States Constitution, Amendment VI

"In all criminal prosecutions, *the accused shall enjoy the right to* a speedy and public trial, by an impartial jury * * * *and to be informed of the nature and cause of the accusation;* to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense" (Emphasis supplied).

Questions to be Presented for Review

1. Did the text of the indictment against these petitioners fully inform them of the crimes allegedly charged against them as required by the provisions of the Treaty of 1842 between the United States and Great Britain particularly Article X thereof, and the subsequent supplementary conventions?

If the answer to the foregoing question is in the negative as it must legally be, then these petitioners have been denied due process of law as prescribed by the Sixth Amendment of the United States Constitution.

2. Did the text of the indictment against these petitioners comply with the statutory requirements of Sections 1290 and 1290-a of the Penal Law of the State of New York and Section 276 of the Code of Criminal Procedure of the same state?

If the answer to the foregoing question is in the negative then these petitioners have been denied due process of law as prescribed by the Sixth Amendment of the United States Constitution.

3. Did the omission of the statement in the indictment against these petitioners of the allegation of "with intent" render the said indictment fatally defective in view of the statutory requirements contained in Sections 1290 and 1290-a of the Penal Law of the State of New York and Section 276 of the Code of Criminal Procedure of the same state and the controlling decisions by the highest courts of the said state prescribing such requirements?

If the answer to the foregoing question is in the affirmative then these petitioners have been denied due process of law as prescribed by the Sixth Amendment of the United States Constitution in that they have not been fully informed of the accusations against them.

4. Did the omission of the recital in the said indictment against these petitioners of the "acts" alleged to have been committed by them and constituting the crimes allegedly charged against them "theft" (larceny) and "fraud and deceit", render the said indictment fatally defective in view of the statutory requirements therefor as prescribed by Sections 1290 and 1290-a of the Penal Law of the State of New York and Section 276 of the Code of Criminal Procedure of the same State and the controlling decisions by the highest courts of the said State and the decisions of this Honorable Court with respect to such statutory requirements?

If the answer to the foregoing question is in the affirmative then these petitioners have been denied due process of law as prescribed by the Sixth Amendment of the United States Constitution, in that they have not been fully informed of the accusations against them.

5. Whether in view of the omission from the indictment against these petitioners of the recital of "with intent" and of the "acts" alleged to have been committed by them and constituting the crimes allegedly charged against them "theft" [larceny] and "fraud and deceit", did the United States Commissioner have jurisdiction to hear the proceedings and to direct extradition of these petitioners?

If the indictment by its text failed to comply with the provisions of the Treaty of 1842 between the United States and Great Britain particularly Article X thereof and the subsequent supplementary conventions, and likewise failed to comply with the statutory requirements of Sections 1290 and 1290-a of the Penal Law of the State of New York and Section 276 of the Code of Criminal Procedure of the same State and the controlling decisions by the highest courts of the said State and the decisions of this Honorable Court with respect to such statutory requirements, then, of course, the United States Commissioner had no jurisdiction to proceed with the hearing, find "probable cause" and direct extradition.

6. Whether the fatally defective text of the indictment against these petitioners as herein pointed out, properly and timely objected to, justified the United States Commissioner to proceed with the hearings in these extradition proceedings and find "probable cause"?

7. Whether the fatally defective text of the complaint against these petitioners as herein pointed out, properly and timely objected to, justified the United States Commissioner to proceed with the hearings in these extradition proceedings and find "probable cause"?

8. Whether the record before the United States Commissioner and his recommendation of extradition of these petitioners was based "upon such evidence of criminality, as according to the laws of the place (New York State) where the fugitive or person so charged shall be found" justified his finding of "probable cause" and the petitioners' commitment for trial if the crime or offense as charged allegedly against these petitioners, had been committed in New York State?

The answer to this question must likewise be in the negative. There was absolutely no evidence of criminality of any kind, offered to or received by the Commissioner. Besides, there was no basis of any kind for the receipt of such evidence by reason of the fact that the complaint upon which the Commissioner assumed to function, lacked the recital of any *charges* against either of these petitioners as has already been pointed out above.

10. Whether the record before the United States Commissioner and his recommendation of extradition of these petitioners was sufficient to *satisfy* the treaty requirements with regard to the recital of the "acts" constituting the criminal offenses allegedly charged against them, under the laws of the Dominion of Canada and particularly under the laws of the State of New York as herein pointed out?

Appendix

(Opinion of United States Court of Appeals, For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 318-319—October Term, 1958.

(Argued April 9, 1959 Decided July 10, 1959.)

Docket Nos. 25567-25568

UNITED STATES OF AMERICA *ex rel.* SOL R. RAUCH and HAROLD D. RAUCH,

Relator-Appellants,

v.

JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents-Appellees.

Before:

HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

Appellants appeal from order of United States District Court for the Eastern District of New York, Byers, *Ch.J.*, dismissing a writ of habeas corpus brought by them to test the validity of an order of a U. S. Commissioner pursuant to 18 U. S. C. § 3184 extraditing them to Canada. Opinion below reported 170 F. Supp. 506. Affirmed.

MAX J. LEBOYER, Brooklyn, N. Y., *for Relator-Appellants.*

DREIBAND, BLEECKER & SILBERMAN (Alexander Dreiband, of counsel), New York City, *for Respondents-Appellees.*

WATERMAN, *Circuit Judge*:

On August 21, 1958 the Ambassador of Canada to the United States submitted a formal request to our Secretary of State for extradition of the relators herein, Sol R. Rauch and Harold D. Rauch, accusing them of having committed an extraditable offense within the jurisdiction of Canada. The Department of State acknowledged receipt of this request and informed the Canadian Ambassador that the request would be considered as soon as the necessary legal steps under 18 U. S. C. § 3184 [1] were completed. Accordingly, on September 26, 1958 counsel for the Attorney General of the Province of Ontario, Canada filed complaints under oath with the United States Commissioner for the Eastern District of New York. After a hearing in which evidence was submitted in the form of depositions and other documents, the Commissioner indicated on November 26, 1958 that he intended to certify to the Secretary of State

[1] 18 U. S. C. § 3184 reads as follows:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

that this evidence was sufficient to support the charge that the relators had committed an extraditable crime within Canada. The Commissioner then remanded the relators to the custody of the United States Marshal. Relators obtained a writ of habeas corpus from the District Court for the Eastern District of New York in order to have the court inquire into the legality of their custody by the United States Marshal. However, the writ was dismissed in an opinion dated February 16, 1959, 170 F. Supp. 506 (E. D. N. Y. 1959). This appeal is from that dismissal.

The requirement of a "treaty * * * for extradition" stated in 18 U. S. C. § 3184 is satisfied in this case by the Treaty between the United States and Great Britain of 1842[2] and the Supplementary Conventions of 1889,[3]

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[2] TREATY BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA. TO SETTLE AND DEFINE THE BOUNDARIES BETWEEN THE POSSESSIONS OF HER BRITANNIC MAJESTY IN NORTH AMERICA, AND THE TERRITORIES OF THE UNITED STATES; FOR THE FINAL SUPPRESSION OF THE AFRICAN SLAVE TRADE; AND FOR THE GIVING UP OF CRIMINALS, FUGITIVE FROM JUSTICE IN CERTAIN CASES.

Signed at Washington, August 9, 1842

(Ratifications exchanged at London, October 13, 1842)

ARTICLE X

It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their Ministers, Officers, or Authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension

of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

ARTICLE XI

The Xth Article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

[3] The pertinent portions of the Supplementary Convention of 1889 follow:

SUPPLEMENTARY CONVENTION BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA FOR THE EXTRADITION OF CRIMINALS

* * *

Whereas by Article X of the Treaty concluded between Her Brittanic Majesty and the United States of America on the 9th day of August, 1842, provision is made for the extradition of persons charged with certain crimes.

And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crime specified in the said Article and in this Convention;

* * *

ART. I.—The provisions of the said Article X are hereby made applicable to the following additional crimes:

* * *

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, made criminal by the laws of both countries.

* * *

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Article X,

1900 [4] and 1951.[5] They clearly provide for and make extraditable the crime which relators were charged with hav-

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provided such participation be punishable by the laws of both countries.

* * *

"VI. The extradition of fugitives under the provisions of this Convention and of the said Article X shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

* * *

[4] The pertinent portions of the Supplementary Convention of 1900 follow:

SUPPLEMENTARY CONVENTION BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA FOR THE MUTUAL EXTRADITION OF FUGITIVE CRIMINALS
(ENLARGING LIST OF CRIMES)

* * *

Article I. The following crimes are added to the list of crimes numbered 1 to 10 in the first Article of the said Convention of the 12th July, 1889, on account of which extradition may be granted, that is to say:

11. Obtaining money, valuable securities, or other property by false pretences.

* * *

Article II. The present Convention shall be considered as an integral part of the said Extradition Convention of the 12th July, 1889, and the first Article of the last-mentioned Convention shall be read as if the list of crimes therein contained had originally comprised the additional crimes specified, and numbered 11 to 13 in the first Article of the present Convention.

* * *

[5] The pertinent portions of the Supplementary Convention of 1951 follow:

SUPPLEMENTARY CONVENTION TO THE SUPPLEMENTARY CONVENTION BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA FOR THE MUTUAL EXTRADITION OF FUGITIVE CRIMINALS.

* * *

ing committed in Canada in the complaints of September 26, 1958. Each states:

> "That heretofore, to wit, on March 21st, 1958, Justice of the Peace J. Little, for the County of York, Province of Ontario, Canada, at the Municipality of Metropolitan Toronto, issued a warrant for the arrest of the defendant above named for the theft of money and securities of the value of Nine Hundred Sixty Thousand ($960,000.00) Dollars obtained by deceit, falsehood or other fraudulent means, the property of Brilund Mines Limited, a crime under the Laws of Canada, pursuant to the Criminal Code of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-54, with amendments thereto, embodying Sections 269(1), 274, 276, 280, 323.(1), 2(15) of the Criminal Code of Canada.
>
> "That on or about the 8th day of September, 1958, a true bill of indictment was handed up in the Supreme Court of Ontario, County of York, Province of Ontario, charging the defendant [Harold D. Rauch] with theft, fraud and conspiracy."

Relators apparently concede the applicability of the treaty. They argue, however, that the district court erred in dis-

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ARTICLE I

The enumeration numbered 11 in Article I of the Supplementary Extradition Convention signed on December 13, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows:

> 11A "Obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.
>
> 11B "Making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences."

missing the writ of habeas corpus because the evidence before the Commissioner was insufficient to satisfy the treaty requirements of production of evidence by the Government of Canada adequate to furnish reasonable ground for the belief that relators had committed within the Dominion of Canada acts constituting a criminal offense under the laws of Canada and under the laws of New York. *Bingham* v. *Bradley*, 241 U. S. 511 (1916). We have no difficulty in holding that such evidence was produced and was before the Commissioner when he made his determination.

From an examination of the six depositions given by men who were in one way or another involved in the transaction in question, one could reasonably believe that relators, together with others, obtained control of Brilund Mines Limited without any payment therefor out of their personal funds, but obtained control by using the corporation's own money and property to obtain and convert to their personal use the controlling stock in that corporation. Those depositions reveal that one could reasonably believe that relators and their associates acting ostensibly as officers and directors of Brilund Mines Limited purchased with $960,000 worth of assets of that corporation from one D. Charles Stuart real property probably known by him to be of an estimated value of less than $1,000. It also seems quite likely from relators' relationship with Stuart and the course of their dealings with him that they also knew of this estimated value, or at least knew that $960,000 was a grossly excessive price. $900,000 of the $960,000 was then used by Stuart to procure control of Brilund Mines Limited by the purchase of a block of 600,000 of its shares of stock from one Ben Smith. Stuart paid Smith $1.50 per share although it would appear that the stock was then being traded at $.40 per share. 400,000 to 500,000 of the shares purchased were turned over to relators and their associates rather than to Stuart. Stuart also gave $5,990 in cash to relators and one other. All this was accomplished by votes

of a new Board of Directors, of which relators were members, hurriedly put into office by the votes of this Smith stock. One could reasonably believe that this new directorate was put into control of the corporation by Smith in order to effect the corporate transaction with Stuart and the consequent sale of the Smith corporate stock to him. These depositions and relevant documentary exhibits were accompanied by a certificate of the Consul-General of the United States at the City of Toronto, Ontario, as required by 18 U. S. C. § 3190 [6] and were properly received into evidence by the Commissioner. Apparently no evidence was presented by relators to controvert them.

On March 12, 1958 the Auditor of the Ontario Securities Commission filed an Information and Complaint before a Justice of the Peace in the Province of Ontario charging that relators and others "did steal money and securities to the value of Nine Hundred and Sixty Thousand Dollars ($960,000) more or less, the property of Brilund Mines Limited", and with defrauding that company of the same amount "by deceit, falsehood or other fraudulent means." On March 21, 1958 that Justice issued warrants for their arrest. Later, on September 8, 1958 the Grand Jury for York County, Ontario returned an indictment against relators charging the same criminal acts that were set out in the Information and Complaint. After an examination of

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[6] 18 U. S. C. § 3190 reads as follows:

§ 3190. Evidence on hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

the applicable portions of the Criminal Code of Canada dealing with theft [7] and fraud [8] we are convinced that the

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[7] The Criminal Code of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-1954, with amendments thereto, contains the law with regard to criminal offenses for the whole of the Dominion of Canada and every Province thereof, including the Province of Ontario. Said Criminal Code embodies the following provisions:

SECTION 269

(1) "Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with intent

(a) to deprive temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing, or of his property or interest in it,

(b) to pledge it or deposit it as security,

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or,

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(3) For the purpose of this act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material."

SECTION 274

"A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen

(a) by the owner of it from a person who has a special property or interest in it,

(b) by a person who has a special property or interest in it from the owner of it,

(c) by the directors, officers or members of a company, body corporate, unincorporated body or of a society associated to-

facts set out in the depositions provided a reasonable ground for the Commissioner to believe that relators committed

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gether for a lawful purpose from the company, body corporate, unincorporated body or society, as the case may be."

SECTION 276

(1) "Every one commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds accordingly.

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefor, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place."

SECTION 280

"Except where otherwise prescribed by Law, every one who commits theft is guilty of an indictable offense and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty ($50.—) Dollars or

(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty ($50.—)."

SECTION 2

"(15) 'every one,' 'person,' 'owner,' and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities and other districts in relation to the acts and things that they are capable of doing and owning respectively.

32. "property includes

(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods.

(b) property originally in the possession or under the control of any person, and any property into or for which it has been

acts criminal under the laws of Canada. It likewise seems clear to us that the contents of the depositions provide a reasonable ground for him to believe that relators committed acts which would be criminal under the laws of New

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converted or exchanged and anything acquired at any time by such conversion or exchange.

37. "steal" means to commit theft.

42. "valuable security" includes

(a) an order, exchequer acquittance or other security that entitles or evidences the title of any person

(i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or society, or

(ii) to a deposit in a savings bank or other bank."

[8] Section 323 reads as follows:

SECTION 323

"(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any persons, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offense and is liable to imprisonment for ten years."

[9] Section 1290 of the New York Penal Law reads as follows:

§ 1290 Larceny defined

A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that: 1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully

York. New York Penal Law §§ 1290,[9] 1294 [10] and 1295 [11] It is immaterial that the acts in question constitute the crime of theft and fraud in Canada and the crime of larceny in New York State. It is enough if the particular acts charged are criminal in both jurisdictions. *Collins* v. *Loisel*, 259 U. S. 309 (1922).

We also find without merit what appears to be relators' claim that they were not properly charged in Canada with having committed a crime. They base this contention on the absence from the Information and Complaint and the indictment of any enumeration of "overt acts," and the lack of the words "with intent" therein. The Complaint and the indictment set out the charges in practically identical language. The indictment states:

"1. The jurors for Her Majesty the Queen present that Ben Smith, D. Charles Stuart, Stanley I

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withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

4. The purpose for which the owner was introduced to part with possession of such property was immoral or unworthy.

[10] The pertinent portion of Section 1294 of the New York Penal Law reads as follows:

§ 1294. Grand larceny in first degree

A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. * * *

2. * * *

3. Property of the value of more than five hundred dollars, in any manner whatever.

[11] Section 1295 of the New York Penal Law reads as follows:

§ 1295. Grand larceny in first degree; how punished

Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years.

Schonbrun, Sol R. Rauch and Harold D. Rauch during the year 1957, at the City of Toronto in the County of York and elsewhere, did steal money and securities to the value of $960,000.00 more or less, the property of Brilund Mines Limited, contrary to the Criminal Code.

"2. The said jurors further present that the said Ben Smith, D. Charles Stuart, Stanley I. Schonbrun, Sol R. Rauch and Harold D. Rauch, during the year 1957 at the City of Toronto in the County of York and elsewhere, by deceit, falsehood or other fraudulent means defrauded Brilund Mines Limited of money and securities to the value of $960,000.00 more or less, contrary to the Criminal Code."

It is not our duty on this appeal to order the relators' release merely because we do not find on this appeal "all the factitious niceties of a criminal trial at common law." *Glucksman* v. *Henkel*, 221 U. S. 508, 512 (1911). "Form is not to be insisted upon beyond the requirements of safety and justice." *Fernandez* v. *Phillips*, 268 U. S. 311, 312 (1925). The criminal intent required by both the Canadian [12] and New York statutes [13] is necessarily involved in the charges as alleged and need not be set out *in haec verba*. Nor does the Information and Complaint of March 12, 1958, or the subsequent indictment, need to contain a list of overt acts making up the crime with which relators are charged. They need be only as precise as is necessary to allow a defendant to prepare a defense, or to prevail upon a plea of former jeopardy in case of reindictment. Surely relators are sufficiently apprised here of the nature of the charges against them.

Affirmed.

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[12] See footnote 7, *supra*.

[13] See footnote 9, *supra*.

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JAMES R. BROWNING

Supreme Court of the United States

OCTOBER TERM, 1959

No. 472

UNITED STATES OF AMERICA, EX REL. SOL R. RAUCH and HAROLD D. RAUCH,
Relators-Petitioners,
against
JOSEPH STOCKINGER and ALEX KRINSKY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS AMICUS CURIAE

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 472

UNITED STATES OF AMERICA, ex rel., SOL R. RAUCH and HAROLD D. RAUCH,

Relators-Petitioners,

against

JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS AMICUS CURIAE

Facts

On or about August 21, 1958, the Government of Canada made formal request to the Secretary of State of the United States for the extradition and delivery of the Defendants, Sol R. Rauch and Harold D. Rauch, accused of committing the crime of theft of money and securities and of fraudulently obtaining money and securities by deceit, falsehood or other fraudulent means, committed within the jurisdiction of Canada. On or about August 26, 1958, the Acting Secretary of State of the United States acknowledged receipt of this request, and informed the Ambassador of Canada that the Department of State will be pleased to give consideration to this request when the necessary legal procedures set forth in Section 3184 of Title 18 of the United States Code have been completed.

On or about September 26, 1958, complaints were filed against each of the defendants with the United States Commissioner for the Eastern District of New York, and warrants issued for their apprehension. On October 6, 1958, both defendants surrendered to the United States Marshal, and were arraigned before Honorable Salvatore T. Abruzzo, where they were paroled in their own custody, pending a hearing subsequently set for October 24, 1958.

The following documentary evidence was submitted upon said hearing.

1. Two letters dated August 21, 1958, showing the appointment and authorization of Alexander Dreiband, Esq., to act for the Attorney General of the Province of Ontario (Exhibit 1 in evidence, Minutes of Hearing, page 3, November 5, 1958).

2. Authenticated copies of the communications between His Excellency, Ambassador of Canada and the State Department of the Government of the United States (Exhibit 2 in evidence, Minutes of Hearing, page 3, November 5, 1958).

3. Pamphlet of Treaties, Series No. 1952, containing copies of all of the treaties concerning extradition between the Government of Canada, the Government of Great Britain and the Government of the United States (Exhibit 3 in evidence, Minutes of Hearing, page 6, November 5, 1958).

4. Authenticated and Exemplified copies of indictment by Grand Jury in the Province of Ontario, York County, against both defendants (Exhibits 4 and 4A in evidence, Minutes of Hearing, page 11, November 5, 1958).

5. Exemplified copies of documents and depositions consisting of the following papers:

(a) Certificate of Counsel General of the United States, at Toronto, Canada (Exhibits 5 and 5A in evidence).

(b) Certificate of the Provincial Secretary of the Province of Ontario (Exhibits 5 and 5A in evidence).

(c) Certificate of Justice of Peace J. Little, for the County of York, Province of Ontario (Exhibits 5 and 5A in evidence, page 4).

(d) Information and sworn complaint of William S. Irvin, auditor, Ontario Securities Commission (Exhibits 5 and 5A in evidence, page 5).

(e) Warrants of arrest against defendants, issued by Justice of Peace, J. Little, charging crimes of theft and fraud (Exhibits 5 and 5A in evidence, pages 7 and 8).

(f) Certificate re transcription of Depositions dated July 21, 1958, by Official Court Stenographer, Charles Hamilton (Exhibits 5 and 5A in evidence, pages 9 and 9A).

(g) Deposition of Benjamin Walter Chechak (Exhibits 5 and 5A in evidence, pages 10 to 13).

(h) Deposition of Fred Findlay (Exhibits 5 and 5A in evidence, pages 14 to 23).

(i) Deposition of Frank Ernest Udell (Exhibits 5 and 5A in evidence, pages 24 to 32).

(j) Deposition of Ian Holt Smith (Exhibits 5 and 5A in evidence, pages 33 to 56, with deletions as indicated in record of hearing November 18, 1958).

(k) Deposition of Vernon Franklin Bowman (Exhibits 5 and 5A in evidence, pages 57 to 63).

(l) Deposition of James Hugh Gilmour Wallace (Exhibits 5 and 5A in evidence, pages 64 to 73).

(m) Affidavit of Peter White, Q.C., setting forth Statutes of Criminal Code of Canada applicable upon this proceeding (Exhibits 5 and 5A in evidence, pages 74 to 79).

(n) Folder of Exhibits introduced through depositions of Benjamin Walter Chechak, Fred Findlay, Frank Ernest Udell, Ian Holt Smith, Vernon Franklin Bowman and James Hugh Gilmour Wallace (Exhibits 5 and 5A in evidence, pages "B" 1 to 41).

After hearings held on November 5, 18, 21, and 26, 1958, before Honorable Salvatore T. Abruzzo, United States Commissioner for the Eastern District of New York, a determination was made by the Commissioner in part as follows:

> "The prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the Defendants, and the Commissioner will certify to the Secretary of State that the Defendants be extradited to the Province of Ontario, Canada, for prosecution." (Minutes of Hearing, pages 217—line 20 to page 218, line 5.)

After this decision by the Commissioner, the defendants were remanded to the custody of the United States Marshal. They were subsequently released on bail, pending the determination of the Writ of Habeas Corpus.

In an opinion dated February 16, 1959, Hon. Mortimer W. Byers dismissed the Writ of Habeas Corpus, and wrote the following opinion:

> "BYERS, Ch.J.:
>
> A writ of Habeas Corpus was granted bearing the above caption, to inquire into the legality of the custody of the U. S. Marshal for this District into which the relators were ordered, pending their extradition to Canada, at the instance of the Government of that country.
>
> The Commissioner before whom the proceedings was laid pursuant to Tit. 18 U. S. C. Sec. 3184, has

decided and determined that 'the prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the defendants, and the Commissioner will certify to the Secretary of State that the defendants be extradited to the Province of Ontario, Canada, for prosecution.'

There are five persons named in the indictment filed in the Supreme Court of Ontario, of whom but two, Sol R. Rauch and Harold D. Rauch are the relators before the Court.

No question of identity is involved, since that was conceded in the record before the Commissioner.

It is stated in the complaint or petition for extradition that the indictment was filed on September 8, 1958. An examination of the documentary evidence submitted to the Commissioner (there was no oral testimony) is convincing to this Court that the action taken was legally justified, and the Writ will be dismissed for reasons briefly to be stated.

For present purposes, the offences charged in the indictment are:

(1) that the defendants named, during the year 1957 at Toronto and elsewhere, 'did steal money and securities to the value of $960,000.00 more or less, the property of Brilund Mines Limited, contrary to the Criminal Code'.

(2) that the said defendants during the same year and at the same places 'by deceit, falsehood or other fraudulent means defrauded Brilund Mines Limited of money and securities to the value of $960,000.00 more or less, contrary to the Criminal Code'.

It is not argued for the relators that the documentary evidence submitted to the Commissioner, namely the original information, the indictment

later filed, and the depositions upon which the said charges were laid, do not constitute a prima facie showing that the relators did the things charged. The contention is that the failure to include in the indictment the words 'with intent to, etc.' render it of no legal effect, and that the Commissioner should have so held, and refused to grant extradition.

The controversy can be resolved without extensive discussion because:

A. The applicable treaties provide that extraditable offences include:

1. Larceny

2. Obtaining money, valuable securities or other property by false pretenses; or by defrauding the public by deceit or falsehood or any fraudulent means whether such deceit would or would not amount to a false pretense.

See treaties between the United States and Great Britain of 1842, 1889 and 1900. The Supplemental Convention of July 12, 1889 may be consulted in this connection.

B. The offences charged fall within the provision of Art. X of the treaty of 1842 which requires delivery up of all persons where the evidence of criminality is according to the laws of the place (New York State in this instance) where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial."

See Penal Law of the State of New York, Sections 1290, 1294, 1295.

C. The following language of the Supreme Court (Mr. Justice Holmes) in *Gluckman* v. *Henkel*, 221 U. S. 508, at 512, is thought to apply here:

"It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if

There is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* v. *Shine*, 187 U. S. 181, 184. See *Pierce* v. *Creecy*, 210 U. S. 387, 405."

See further,

Wright v. *Henkel*, 190 U. S. 40;
Factor v. *Laubenheimer*, 290 U. S. 276;
U. S. ex rel. Hattfield, 11 Fed. Supp. 806, modified 87 Fed. (2) 358, cert. den. 300 U. S. 678.

D. While it is true that both the Criminal Code of Canada in Sections 269 (1), 274, 276, 280, 323(1), 2(15) et seq. are relied upon to support the indictment, the first named is the one upon which the relators' present argument is based. That section reads:

"SECTION 269

(1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with intent

(a) to deprive temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,

(b) to pledge it or deposit it as security,

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or

(d) to deal with it in such a manner that it cannot be restored to the condition in which it was at the time it was taken or converted.

(2) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(3) For the purpose of this act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material."

It is the presence of the words "with intent" in the statute, and their absence from the indictment, that the relators rely upon to sustain their cause.

Section 1290 of the New York Penal Law dealing with larceny provides that "a person who, with *intent* (ital. supplied) to deprive or defraud another of the use and benefit of property etc. wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner any money * * *, steals such property, and is guilty of larceny".

If the matter were before me for decision, I should find no difficulty in holding that to charge a man with stealing certain property from its true owner, in violation of the above statute, would be to charge him with intentionally depriving another of his property, i.e., with larceny; that the word 'steal' necessarily involves the required intent, and plainly negatives a benevolent or lawful purpose. It is the sheerest sophistry to argue otherwise.

As to the Criminal Code of Canada, Section 323, par. 37, provides:

" 'Steal' means to commit theft."

The present holding is that within the restricted inquiry permitted in a habeas corpus proceeding to test the validity of extradition as to these relators, they have been charged with the intent necessary to require them to stand trial upon the indictment in question.

E. The argument is specious that the second charge in the indictment is deficient in failing to contain a concise statement of the acts constituting the alleged crime of defrauding the named corpora-

tion of its property, by "deceit, falsehood or other fraudulent means". No necessity is seen nor sought to be expounded for holding that the Government should have been required to plead the evidence upon which it relies.

Incidentally the relators have had the benefit of the depositions which were before the Commissioner, and if they are entitled to what we should call further particulars, it is to be expected that the trial court will deal with their requests according to accepted use and practice.

Reference may be had to Subd. 2 of Section 269 of the Criminal Code of Canada to the effect that "A taking or conversion of anything may be fraudulent notwithstanding that it was effected without secrecy or attempt at concealment." (Findlay's deposition, p. 16, therefore does not aid the relators.)

Section 274 provides for conviction of theft notwithstanding that the subject-matter was stolen (c) by the directors, officers or members of a company, body, corporate, * * * from the company * * * as the case may be."

If the Commissioner thought that the documentary evidence presented to him, spelled out the probable commission of an offence by the relators, falling within the foregoing provisions, it must be said that this court agrees with him.

F. The remaining contention that the indictment is not sufficiently explicit as to the sum involved in each count, namely $960,000.00 "more or less", is not worthy of serious consideration. If the expression is not adequate to indicate the approximate sum involved in the respective charges, nothing that this court can say will render them more so.

In sum, the relators have been fairly apprized of the charges laid against them, the offences charged are extradictable, and there was reasonable cause presented to the Commissioner to hold them for extradition. Therefore the Writ of Habeas Corpus is hereby dismissed."

Statutes Involved

Section 3184, Title 18, United States Code Annotated

Sec. 3184: FUGITIVES FROM FOREIGN COUNTRY TO UNITED STATES.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any Justice or Judge of the United States, or any Commissioner authorized so to do by a Court of the United States, or any Judge of a Court of Record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such Justice, Judge or Commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Section 3186, Title 18, United States Code Annotated

Sec. 3186: SECRETARY OF STATE TO SURRENDER FUGITIVE.

"The Secretary of State may order the person committed under Sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty * * *."

Section 3190, Title 18, United States Code Annotated

SECTION 3190. EVIDENCE ON HEARING.

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the Tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

Section 3195, Title 18, United States Code Annotated

SECTION 3195. PAYMENT OF FEES AND COSTS.

"All costs or expenses incurred in any extradition proceeding in apprehending, securing and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the Commissioner, shall be certified by the Judge or Commissioner before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the Judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall

cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States."

The Criminal Code of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-1954, with amendments thereto, contains the law with regard to criminal offenses for the whole of the Dominion of Canada and every Province thereof, including the Province of Ontario. Said Criminal Code embodies the following provisions:

SECTION 269

(1) "Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything whether animate or inanimate, with intent

(a) to deprive temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing, or of his property or interest in it,

(b) to pledge it or deposit it as security,

(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(3) For the purpose of this act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material".

SECTION 274

"A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen

(a) by the owner of it from a person who has a special property or interest in it,

(b) by a person who has a special property or interest in it from the owner of it,

(c) by the directors, officers or members of a company, body corporate, unincorporated body or of a society associated together for a lawful purpose from the company body corporate, unincorporated body or society, as the case may be".

SECTION 276

(1) "Everyone commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds accordingly.

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefore, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place".

SECTION 280

"Except where otherwise prescribed by Law, every one who commits theft is guilty of an indictable offense and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty ($50.—) Dollars or

(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty ($50.—)".

SECTION 323

"(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any persons, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offense and is liable to imprisonment for ten years".

SECTION 2

"(15) 'every one', 'person', 'owner', and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities and other districts in relation to the acts and things that they are capable of doing and owning respectively.

32. "property includes

(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods.

(b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by such conversion or exchange.

37. "steal" means to commit theft.

42. "valuable security" include

(a) an order, exchequer acquittance or other security that entitles or evidences the title of any person

(i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or socie., , or

(ii) to a deposit in a savings bank or other bank".

Larceny as known in the Law of England and in the State of New York, is designated in Canada as theft covered by the definition of theft as heretofore herein quoted. The sections of the Penal Law of the State of New York, applicable, and which set forth the same crimes as that which the defendants are charged with having committed in Canada are as follows:

Section 1290 of the Penal Law of the State of New York

1290, LARCENY DEFINED

"A person who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of any kind, steals such property, and is guilty of larceny.

Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; or

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy".

Section 1294 of the Penal Law of the State of New York

SECTION 1294. GRAND LARCENY IN FIRST DEGREE

"A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. * * *

2. * * *

3. Property of the value of more than five hundred ($500.—) Dollars, in any manner whatever".

Section 1295 of the Penal Law of the State of New York

SECTION 1295. GRAND LARCENY IN THE FIRST DEGREE; HOW PUNISHED

"Grand larceny in the first degree is punishable by imprisonment for a term not exceeding ten years."

Treaties Involved

[1] TREATY BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA. TO SETTLE AND DEFINE THE BOUNDARIES BETWEEN THE POSSESSIONS OF HER BRITANNIC MAJESTY IN NORTH AMERICA, AND THE TERRITORIES OF THE UNITED STATES; FOR THE FINAL SUPPRESSION OF THE AFRICAN SLAVE TRADE; AND FOR THE GIVING UP OF CRIMINALS, FUGITIVE FROM JUSTICE IN CERTAIN CASES.

Signed at Washington, August 9, 1842

(Ratifications exchanged at London, October 13, 1842)

[1] From British and Foreign State Papers, Vol. 30, p. 360.

Article X

It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their Ministers, Officers, or Authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective Judges and other Magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such Judges or other Magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining Judge or Magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.

Article XI

The Xth Article shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

1889

[1] Supplementary Convention Between Her Majesty and the United States of America for the Extradition of Criminals

Signed at Washington, July 12, 1889

(Ratifications exchanged at London, March 11, 1890)

Whereas by Article X of the Treaty concluded between Her Britannic Majesty and the United States of America on the 9th day of August, 1842, provision is made for the extradition of persons charged with certain crimes.

And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

The said High Contracting Parties have appointed as their Plenipotentiaries to conclude a Convention for this purpose, that is to say:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States;

And the President of the United States of America, James G. Blaine, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:

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[1] From British & Foreign State Papers, Vol. 81, p. 41.

Art. I.—The provisions of the said Article X are hereby made applicable to the following additional crimes:

1. Manslaughter when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, made criminal by the laws of both countries.

5. Perjury, or subornation of perjury.

6. Rape, abduction, child stealing, kidnapping.

7. Burglary, housebreaking or shopbreaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Article X, provided such participation be punishable by the laws of both countries.

II. A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded by one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try to punish him for an offence of a political character.

No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the Government in whose jurisdiction the fugitive shall be at the time shall be final.

III. No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

IV. All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has offered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

V. If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on account of crimes or offences committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

The provisions of this Article, and also of Articles II to IV inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Article X as well as to surrender for offences specified in this Convention.

VI. The extradition of fugitives under the provisions of this Convention and of the said Article X shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

VII. The provisions of the said Article X and of this Convention shall apply to persons convicted of the crimes therein respectively named, and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

VIII. The present Convention shall not apply to any of the crimes herein specified which shall have been committed or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force.

IX. This Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

It shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties, and shall continue in force until one or the other of the High Contracting Parties shall signify its wish to terminate it, and no longer.

In witness whereof, the undersigned have signed the same, and have affixed thereto their seals.

Done in duplicate, at the City of Washington, this 12th day of July, 1889.

(L. S.) JULIAN PAUNCEFOTE
(L. S.) JAMES G. BLAINE

1900

[1] Supplementary Convention Between Her Majesty and the United States of America for the Mutual Extradition of Fugitive Criminals (Enlarging List of Crimes)

Signed at Washington, December 13, 1900

(Ratification exchanged at Washington, April 22, 1901)

Her Majesty the Queen of Great Britain and Ireland and the President of the United States of America, being desirous of enlarging the list of crimes on account of which extradition may be granted under the Convention concluded between her Britannic Majesty and the United States on the 12th July 1889, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a Supplementary Convention for this purpose, and have appointed as their Plenipotentiaries, to wit:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Excellency the Right Honourable Lord Pauncefote, Knight Grand Cross of the Most Honourable Order of the Bath, Knight Grand Cross of the Most Distinguished Order of St. Michael, and St. George, and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States; and

The President of the United States, the Honourable John Hay, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and concluded the following Articles:

Article I. The following crimes are added to the list of crimes numbered 1 to 10 in the first Article of the said Convention of the 12th July, 1889, on

[1] From British & Foreign State Papers, Vol. 92, p. 72.

account of which extradition may be granted, that is to say:

11. Obtaining money, valuable securities, or other property by false pretences.

12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

13. Procuring abortion.

Article II. The present Convention shall be considered as an integral part of the said Extradition Convention of the 12th July, 1889, and the first Article of the last-mentioned Convention shall be read as if the list of crimes therein contained had originally comprised the additional crimes specified, and numbered 11 to 13 in the first Article of the present Convention.

The present Convention shall be ratified, and the ratifications shall be exchanged either at London or Washington as soon as possible.

It shall come into force ten days after its publication, in conformity with the laws of the High Contracting Parties, and it shall continue and terminate in the same manner as the said Convention of the 12th July, 1889.

In testimony whereof the respective Plenipotentiaries have signed the present Convention in duplicate, and have thereunto affixed their seals.

Done at Washington, this 13th day of December 1900.

(L. S.) PAUNCEFOTE
(L. S.) JOHN HAY

SUPPLEMENTARY CONVENTION TO THE SUPPLEMENTARY CONVENTION BETWEEN HER MAJESTY AND THE UNITED STATES OF AMERICA FOR THE MUTUAL EXTRADITION OF FUGITIVE CRIMINALS

Signed at Washington, December 13, 1900

Canada and the United States of America, being desirous of modifying and supplementing in certain respects the list of crimes on account of which ex-

tradition may be granted under the Treaties and Conventions in force between Canada and the United States of America, particularly the Convention concluded by the United States of America and Her Britannic Majesty on December 13, 1900, so as to comprehend any and all frauds which are punishable criminally by the laws of both contracting states, particularly those which occur in connection with transactions in securities, have decided to conclude a Supplementary Convention for that purpose and have appointed as their respective Plenipotentiaries:

Canada:

Lester Bowles Pearson, Secretary of State for External Affairs in the Government of Canada, and

Stuart Sinclair Garson, Minister of Justice and Attorney-General in the Government of Canada, and

The United States of America:

Don C. Bliss, Minister of the United States of America at Ottawa, who having communicated to one another their respective full powers, found in good and due form, have agreed as follows:

ARTICLE I

The enumeration numbered 11 in Article I of the Supplementary Extradition Convention signed on December 13, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows:

11A "Obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence.

11B. "Making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences."

ARTICLE II

The Present Supplementary Convention shall be ratified and the instruments of ratification shall be exchanged at Ottawa.

The present Supplementary Convention shall enter into force on the day of the exchange of the instruments of ratification and it shall continue in force as though it were an integral part of the Supplementary Convention of December 13, 1900, subject to the provisions of Article II of that Supplementary Convention with respect to termination.

IN WITNESS WHEREFORE, the undersigned Plenipotentiaries have signed the present Supplementary Convention and have affixed thereto their respective seals.

Done in duplicate at Ottawa, this 26th day of October, 1951.

For Canada:

L. B. PEARSON
STUART S. GARSON

For the United States of America:

DON C. BLISS

POINT I

The treaties between the United States and the United Kingdom of Britain and Canada are applicable.

The treaties and conventions set forth herein prescribes the conditions and terms under which persons accused of crimes in Canada may be extradited from the United States. The particular crimes ascribed to the defendants herein are larceny (theft) and larceny (theft) by deceit, falsehood and fraudulent means. This crime was specifically covered in the Supplementary Convention between Her Majesty and

the United States of America for the Extradition of Criminals, signed at Washington July 12, 1889 and which contained in part the following language:

> "Art. I. The provisions of Article X are hereby made applicable to the following additional crimes:
>
> 3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowning the same to have been embezzled, stolen or fraudulently obtained.
>
> 4. Fraud by a bailee, banker, agent, factor, trustee, or director, or m ber or officer of any company, made criminal by t. ws of both countries."

It was also further enlarged upon in the Supplementary Convention signed in Ottawa on the 26th day of October, 1951, which read in part as follows:

ARTICLE I

> "The enumeration numbered 11 in Article I of the Supplementary Extradition Convention signed on December 13th, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows:
>
> 11A. "Obtaining property, money or valuable securities by false pretenses or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to false pretense."

The crimes with which the petitioners have been charged with committing in the Province of Ontario, Canada, and for which they have been indicted in Ontario, Canada, are as follows:

> "*1st Count*: That the defendants did "steal money and securities to the value of $960,000.00 more or less, the property of Brilund Mines, Limited".
>
> *2nd Count*: That the defendants "by deceit, falsehood or other fraudulent means defrauded

Brilund Mines Limited of money and securities to the value of $960,000.00, more or less".

Thus, not only do the crimes with which the petitioners are charged fall squarely within the treaties in force but they are clearly charges which are crimes in the Asylum State, under Sections 1290-1295 of the Penal Law of the State of New York.

It has been held that obligations of treaty should be liberally construed so as to give effect to apparent intention of parties (*Valentine* v. *U. S. ex rel. Neidecker*, N. Y. 1936, 57 S. Ct. 100, 299 U. S. 5, 81 L. Ed. 5).

See also *Factor* v. *Laubenheimer*, Ill. 1933, 54 S. Ct. 191, 290 U. S. 276, 78 L. Ed. 315.

POINT II

The crimes charged are extraditable offenses.

The crime of receiving money knowing it to have been fraudulently obtained was an extraditable offense, under Dawes-Simon Extradition with Great Britain of 1932. *Factor* v. *Laubenheimer*, Ill. 1933, 54 S. Ct. 191, 290 U. S. 276, 78 L. Ed. 315.

See also *Cleugh* v. *Strakosch*, C. C. A. Col. 1940, 109 F. 2d 330.

See also *Wright* v. *Henkel*, N. Y. 1903, 23 S. Ct. 781, 786, 190 U. S. 40, 47 L. Ed. 948.

Obtaining money in Canada by false representations with intent to defraud, was an extraditable offense. *Bernstein* v. *Gross*, C. C. A. Tex. 1932, 58 F. 2d 154.

POINT III

An analysis of the documents introduced in evidence, and the testimony of the witnesses in said depositions is ample to support a finding of probable cause.

Exhibits 4 and 4-A in evidence, the indictments found against the petitioners by the Grand Jury, contain a list of the witnesses who appeared and testified before that body. That list contains in part the following names: Ian Holt Smith, Benjamin Walter Chechak, Fred Findlay, Frank Ernest Udell, Vernon Bowman and James Hugh Gilmour Wallace. It is significant to note that the depositions of the aforementioned witnesses are also in evidence in this proceeding (Exhibit 5 and 5 A in evidence).

A resume of the testimony contained in said depositions shows the following facts to have been established. The petitioners, Sol R. Rauch and Harold D. Rauch, together with others sought to obtain control of the stock interests of the Brilund Mines Limited. They sought to accomplish this without any payments of their own funds, but rather by the devious means of using the money and property of the corporation to obtain control of the stock of said corporation and convert same to their own use and benefit. A geologist was hired to prepare a report on the value of a piece of property owned by one Stuart, to induce Brilund Mines to purchase said property. The geologist Chechak, gives the value of the property at something under One Thousand ($1,000.00) Dollars (Exhibit 5 and 5 A in evidence, page 12, lines 10 to 14). The petitioners, as officers and directors, bought this property from Stuart for Nine Hundred Sixty Thousand ($960,000.00) Dollars, paid for with a check of Brilund Mines Limited, signed by Sol R. Rauch as Secretary of the corporation (Exhibit 5 and 5 A in evidence, "B" page 15).

The proceeds of this payment to Stuart was disbursed by him as follows:

A check for Nine Hundred Thousand ($900,000.00) Dollars was issued by Stuart to Ben Smith in payment for the delivery of six hundred thousand shares of stock of the Brilund Mines Limited (Exhibit 5 and 5A in evidence, "B" page 13) to the Rauchs; Stuart and Shonbrun. This enabled the Rauchs and their associates to obtain the controlling interest of the corporation and approve the purchase of the Stuart property, worth under One Thousand ($1,000.00) Dollars, for the purchase price of Nine Hundred Sixty Thousand ($960,000.00) Dollars (Exhibit 5 and 5A in evidence, "B" page 35).

Stuart then proceeded to pay to Bowman and Wallace a finders fee of Fifty Thousand ($50,000.00) Dollars out of the Nine Hundred Sixty Thousand ($960,000.00) Dollars proceeds of the sale of worthless property, for the benefit of the Rauchs and their associates (Exhibit 5 and 5A in evidence, "B" page 21). This check was drawn by Stuart and cashed. Bowman and Wallace received Twenty Five Thousand ($25,000.00) Dollars in cash, each.

This left Ten Thousand ($10,000.00) Dollars in the possession of Stuart for the property he sold, and One Hundred Thousand (100,000) Shares of Brilund Mines Limited, valued at about Forty Thousand ($40,000.00) Dollars. Stuart then drew a check for Five Thousand Nine Hundred Ninety ($5,990.00) Dollars which he cashed (Exhibit 5 and 5A in evidence, "B" page 22). He turned the proceeds of this check over to the Rauchs in the presence of the witness Udell (Exhibit 5 and 5A in evidence, page 31, lines 28 to 30).

This left Stuart with Four Thousand Ten ($4,010.00) Dollars of the proceeds of the Nine Hundred Sixty Thousand ($960,000.00) Dollars from the sale, which, in addition to the One Hundred Thousand (100,000) Shares of Stock, was the actual monies he received for selling the property to Brilund Mines Limited for Nine Hundred Sixty Thousand ($960,000.00) Dollars.

It is thus established that the Rauchs, by their theft of the monies in the treasury of the Brilund Mines Limited, acquired for their own use and benefit Five Hundred Thousand (500,000) Shares of the common stock of the corporation, a controlling interest, as well as Five Thousand Nine Hundred Ninety ($5,990.00) Dollars in cash from the proceeds of the fraudulent purchase of Stuart's worthless property, as well as Fifty Thousand ($50,000.00) Dollars paid to Wallace and Bowman, as finders, to induce Smith to turn over the control of the corporation to the Rauchs and their associates.

The evidence clearly shows that Smith was induced to part with his stock, for the Rauchs offered him a price of One Dollar and Fifty Cents ($1.50) per share for a stock then selling on the Exchange for Forty Cents (40¢) per share. This was not hard to do, for the defendants were making this purchase with the corporation's money, and not with their own funds.

POINT IV

The majority of cases cited by petitioners in their brief completely support the contentions of the respondents herein.

Throughout the entire brief submitted by the petitioners herein, there are many cases cited as supporting their contentions when in truth and in fact they actually completely support the arguments advanced by the respondents herein. For instance, on pages 16 and 20 of petitioners' brief they cite the case of *United States* v. *Corbett*, 215 U. S. 233, as authority for the statement that "intent" must be alleged in the indictment since it is a necessary element. In truth and in fact, the dictum of the case is that where intent is an essential ingredient of a crime it may be charged in general terms and its existence becomes a question for the jury, excepting only where the criminal intent could not, as a

matter of law, have existed under any possible circumstances.

Also on pages 16 and 20 of petitioners' brief is cited the case of *People* v. *Adamchesky*, 184 Misc. 769, 55 N. Y. Supp. (2), 90 U. S. Code 451, for the same proposition as set forth in the preceding paragraph. Actually this case has no application at all. In the *Adamchesky* case the defendants were indicted for larceny in New York County and in a separate indictment were charged with transporting stolen goods as a Federal offense in the Federal Court. The Court, in sustaining the sufficiency of the indictment, held that this was perfectly proper since they were separate crimes and were charged sufficiently so that the defendant would be aware of the nature of the charge against him.

On page 19 of petitioners' brief, they cite the case of *People* v. *Weiss*, 300 N. Y. Supp. 249, as authority for the proposition that the Court of Appeals has ruled when particular or specific "intent" is essential to and is the gist of offense, it is necessary to allege "intent" with distinctness and precision, and to support such allegation by proof. Actually, *People* v. *Weiss* is authority for holding an indictment alleging that on a designated day a designated person was seized, confined and detained against his will and without authority of law until a particular day, sufficiently pleaded the statutory crime of kidnapping notwithstanding failure to plead the "intent" with which victim was seized and confined. The Court determined the test of sufficiency of indictment is whether indictment identifies charge against defendant so that his conviction or acquittal will bar a subsequent charge for the same offense and whether he is charged so as to enable him to prepare his defense.

The Court said at page 255:

> "In applying this test Courts should be liberal, not technical. Thus construed, the indictment is sufficient and the defendants were not prejudiced by the

> failure to plead the crime charged in the identical words of the Statute. To hold otherwise would be to sacrifice substance to form and 'abandon much that has been accomplished to simplify procedure upon criminal trials.'' *People* v. *Marcus*, 235 App. Div. 397, 257 N. Y. S. 424, 428.

So it is apparent that the case cited by the petitioners completely supports the contentions of the respondents herein, for the indictment and the affidavits submitted in evidence before the Commissioner certainly are sufficient information for the defendant to understand not only the crime with which he is being charged, but actually supply him with the evidence of the commission of the crime as testified to by witnesses in the Courts in Canada.

On page 4 of the petitioners' brief there is cited the case of *Vaccaro* v. *Collier*, 38 F. (2d) 862, as authority for the fact that the law of the asylum State prevails. In truth and in fact this case is authority for the rule of law that a Writ of Habeas Corpus cannot be used as a means for obtaining rehearing of what Commissioner has already decided in proceedings for extradition of alleged fugitive to a foreign country.

On pages 21 and 26 of petitioners' brief they cite the case of *Capone* v. *United States*, 56 F. 2d 927, as supporting the contentions of the petitioners therein. This case stands for the proposition that an indictment is sufficient if it apprises the accused with reasonable certainty, of the nature of the accusation against him.

Ex Parte Davis, 54 F. 2d 723, is an exceptionally strong argument in favor of the respondents herein, for it was held in that case that sufficiency of the charge in Mexico was not before the Commissioner in extradition proceedings except insofar as tending to show an extraditable crime had been committed (18 U. S. C. A. 3184). In the instant case there was ample proof before the Commissioner of

not only the statutory requirements of the Canadian Criminal Code but also of the New York Penal Law and that the appellants herein had committed an extraditable offense.

The case of *People* v. *Damar*, 106 N. Y. 502, cited on page 26 of petitioners' brief has no application at all in this case for that case turned upon the fact that one form of larceny was pleaded in the indictment but another form of larceny was proven upon the trial and for that reason the conviction was reversed. The petitioners lose sight of the fact that while the necessary ingredient of a crime is the intent to commit same, the burden upon the prosecution is to prove that intent upon the trial and if the charge sufficiently clarifies the crime committed the facts of intent can thereafter be proven upon the trial itself.

It is one thing to write a voluminous brief and to cite many cases but all of this work accomplishes naught if the cases cited do not clearly show a determination of the legal problems therein. It is submitted that the petitioners have failed to set forth any leading cases that truly support the untenable position which they must, of necessity, take in the instant case. They overlook completely the tendency on the part of the Courts of this country to give full faith and credit not only to the treaties involved with foreign countries but also to eliminate the many technical objections which are the only defenses which can be raised in matters of extradition. The stress laid by the appellants on the sufficiency of the indictment is a mere surplus usage of vocabulary for in the instant case the evidence of finding probable cause is so completely shown by the authenticated depositions in evidence before the Commissioner that if no indictment had ever been offered in evidence there still would have been more than ample evidence before the Commissioner to find probable cause as he did.

POINT V

The holding by the Commissioner, the dismissal of the Writ of Habeas Corpus by Judge Byers and unanimous affirmance of these two decisions by the United States Court of Appeals for the Second Circuit are all amply supported by the extradition laws of the United States and the many reported decisions under those laws.

The language of the Supreme Court (Mr. Justice Holmes) in *Glucksman* v. *Henkel*, 221 U. S. 508, at 512, applies here as suggested by Judge Byers, in which the Court said:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. *Grin* v. *Shine*, 210 U. S. 387, 405."

Extradition is a summary ministerial proceeding to expedite apprehension and return of fugitives, rather than a judicial proceeding to inquire into merits of charges, and this section should be accorded a liberal construction to accomplish return of fugitive summarily. *People ex rel. Millet* v. *Babb*, 1953, 115 N. E. 2d 241, 1 Ill. 2d 786.

Proceedings on application by foreign country for extradition of persons charged with crime, as provided for by treaty, is not a criminal proceeding, and greater liberality in reception of evidence is to be exercised than in criminal or other civil proceedings. *In re Lo Dolce*, D. C. N. Y. 1952, 106 F. Supp. 455.

Emigrants and exiles for cause of political difference at home are entitled to asylum in this country, but not malefactors; on the contrary, the foreign government which reclaims its fugitive malefactors is serviceable to us by ridding us of the intrusive presence of crime, hence, when reclamation of a fugitive from justice is made under treaty stipulation by any foreign government, it is the duty of the United States to aid in relieving the case of any technical difficulties which may be interposed to defeat the ends of public justice, the object to be accomplished being alike interesting to both governments, namely the punishment of malefactors, who are the common enemies to all society. 1855, 7 op. Atty. Gen. 537.

The complaint in this proceeding is in proper legal form, and clearly apprises the defendants of the nature of the charges against them. The complaints clearly show that warrants for the arrest of the defendants were issued by a Justice of the Peace for the County of York, Province of Ontario, for the

> "theft of money and securities of the value of Nine Hundred Sixty Thousand ($960,000.00) Dollars obtained by deceit, falsehood or other fraudulent means, the property of Brilund Mines Limited, a crime under the Laws of Canada, being Chapter 51, 2-3 Eliz. II, Statutes of Canada, 1953-54, with amendments thereto, embodying Sections 269 (1), 274, 276, 280, 323.(1), 2.(15) of the Criminal Code of Canada."

Thus, not only is the nature of the crime clearly set forth, but also the petitioners were apprised of the Specific Sections of the Criminal Code of Canada which they were alleged to have violated.

Where a complaint on which extradition proceedings are based intelligibly describes and identifies the offense, which is punishable by the laws of both countries and is included in the extradition treaty, it is not material that it is not described by the same name in the laws of both

countries or at common law. *Powell* v. *U. S.*, Mich. 1913, 206 F. 400, 124 C. C. A. 282.

The complaint, to give jurisdiction, need not have the precision of an indictment, but should set forth the substantial features of the offense, so that the Court can see that the particular crime charged is one enumerated in the treaty. *In re Adutt*, c.c. Ill. 1893, 55 F. 376.

Under Article 10 of the extradition treaty with Great Britain of 1842, a complaint for the arrest and examination of an alleged offender was not required to set out the offense with the particularity of an indictment, but would be sufficient if it conformed to the requirements of a preliminary complaint under the local law where the accused was found. *In re Herskovitz*, D. C. Ohio 1901, 136 F. 713.

Where a complaint, on oath by a duly authorized officer of Canada, alleged that S. had been charged before a Justice of the Peace of Canada with murder there committed, and a warrant issued for her arrest, the original warrant being attached to the complaint, and that the officer believed the charge as stated in the warrants to be true, it was sufficient to give the Commissioner jurisdiction to issue a warrant for the arrest of S. *Ex parte Sternaman*, D. C. N. Y. 1896, 77 F. 595, affirmed 80 F. 883, 26 C. C. A. 214, application for reargument denied 83 F. 690, 28 C. C. A. 377.

Canadian Government was entitled to extradition of alleged violator of Canadian Laws even though the complaint set forth offense covered by Laws of Canada as "theft or stealing" and of State where offender was being held as "fraud", and which was designated in complaint as larceny. *U. S. ex rel. Hatfield* v. *Guay*, D. C. N. H. 1935, 11 F. Supp. 806, modified 87 F. 2d 358, certiorari denied 57 S. Ct. 669, 300 U. S. 678, 81 L. Ed. 883, rehearing denied 57 S. Ct. 793, 301 U. S. 713, 81 L. Ed. 1365.

The attack upon the validity of the indictment, which appears to be the main point of this petition must fail for several reasons. In the first place, the forum in which the validity of the indictment may be attacked, is in the Courts of Canada, after the defendants have been returned to plead to said indictment. Secondly, the presence of the indictment is superfluous for the purpose of this proceeding, and was made a part hereof merely for the purpose of helping the Commissioner determine the question of probable cause. Under Section 3182, Title 18 of the U. S. Code Annotated, all of the leading cases held that the indictment is prima facie evidence of probable cause.

If Grand Jury has returned indictment that document is prima facie evidence of probable cause, as regards sufficiency of requisition in extradition proceeding. *U. S. ex rel. McCline* v. *Mevering*, C. C. A. Ill. 1935, 75 F. 2d 716.

The indictment is sufficient if it conforms to the Law of the State where the offense is committed. *Webb* v. *York*, Colo. 1897, 79 F. 616, 25 C. C. A. 133.

An indictment alone ordinarily is sufficient to permit extradition of accused to demanding State because indictment presupposes testimony of witnesses before Grand Jury. *People ex rel. Lipschitz* v. *Bessenger*, 1947, 75 N. Y. S. 2d 392, 273 App. Div. 19.

In an extradition proceeding the technical sufficiency of an indictment as a pleading will not be examined further than to ascertain whether it substantially charges a crime, and whether its allegations are good in substance, and its technical accuracy as a pleading will be left to the tribunal of the demanding State, in which it was found and is pending. *People ex rel. MacSherry* v. *Enright*, 1920, 184 N. Y. S. 248, 112 Misc. 568, affirmed 188 N. Y. S. 945.

An indictment against a person sought to be extradited, duly certified was conclusive in the absence of fraud, and justified a warrant of arrest by the Governor of this State. *Peo. ex rel. Marshall* v. *Moore*, 1915, 153 N. Y. S. 10, 167 App. Div. 479, affirmed 112 H. E. 1070, 217 N. Y. 632.

In the present case it is clearly shown that the offense occurred in Toronto, Province of Ontario, Canada, and that the offenses alleged in the indictment are contained in the various treaties between the United States, Great Britain and Canada.

All of the affidavits submitted upon the hearing of this matter being properly authenticated are admissible in this proceeding. In the case of *Bingham* v. *Bradley*, Ill. 1916, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136, the Court held that properly authenticated affidavits were not inadmissible in proceedings for extradition to Canada because taken ex rel. party under treaty with Great Britain August 9, 1842, Article 10, and R. S.

The Court also held in *Ex parte Schorer*, D. C. Wisc. 1912, 197 F. 67, that former Section 655 of Title 18 made the consular certificate the final and controlling guide in determining the admissibility of testimony before the Extradition Commissioner, and when the documentary evidence has been authenticated by this Section (3190 Title 18, U. S. Code Annotated), it was admissible, leaving to the Commissioner merely the question of determining sufficiency of the evidence therein contained.

An indictment, or its equivalent, in the foreign country, is not necessary to authorize extradition for a crime committed therein. *Muller's Case*, D. C. Pa. 1863, Fed. Cas. No. 9,913.

Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty

of crime as to make it proper that he should be tried. *Glucksman* v. *Henkel*, N. Y. 1911, 31 S. Ct. 704, 705, 221 U. S. 508, 55 L. Ed. 830.

International extradition will not be refused for lack of refinements of pleading required by either jurisdiction. *Bernstein* v. *Gross*, C. C. A. Tex. 1932, 58 F. 2d 154.

The dismissal of the Writ by Judge Byers was proper. As he pointed out in his written decision, the appellants did not urge before him that the depositions and the indictment did not constitute a prima facie showing that they did the things charged. The appellants had the benefit of the depositions which were before the Commissioner. The appellants were thus fairly apprized of the charges against them, the offenses charged are extraditable, and there was reasonable cause presented to the Commissioner to hold them for extradition. Therefore the Writ of Habeas Corpus was properly dismissed.

In order to justify a Commissioner in issuing a certificate to the executive authority for the surrender of the accused in extradition proceedings, it is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged, and the evidence need not be conclusive, nor must the Commissioner be absolutely convinced of the guilt of accused. *United States* v. *Piaza*, D. C. N. Y. 1904, 133 F. 998.

Habeas Corpus is available to party whose extradition is sought by foreign country only to inquire whether Magistrate holding party for extradition had jurisdiction, whether offense charged is within treaty, and whether there was reasonable ground to believe accused guilty. *U. S. ex rel. Hatfield* v. *Guay, supra.*

See also:

Fernandez v. *Phillips*, 1925, 45 S. Ct. 541, 268 U. S. 311, 69 L. Ed. 970;

Bingham v. *Bradley*, Ill. 1916, 36 S. Ct. 634, 241 U. S. 511, 60 L. Ed. 1136.

The Court issuing the Writ of Habeas Corpus must

> "inquire and adjudge whether the Commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the Statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such Court is not to inquire whether the legal evidence of facts before the Commissioner was sufficient or insufficient to warrant his conclusions; nor, if there was legal and competent evidence of facts before the Commissioner for him to consider in making up his decision as to the criminality of the accused, is the Court, on Habeas Corpus, to hold the proceedings illegal, and to discharge the prisoner, because some other evidence was introduced which was not legal or competent, but was held to be so by the Commissioner, and was considered by him on the question of fact, or because the Court, on a consideration of all the evidence which the Commissioner considered, would have come to a different conclusion, or because the Court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of facts from that at which the Commissioner arrived." *In re Stupp*, C. C. N. Y. 1875, 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

In Habeas Corpus proceedings for the discharge of a prisoner held on an extradition warrant, the technical sufficiency of the indictment on which the warrant was issued is not open to question. *Ex parte Birdseye*, D. C. N. Y. 1917, [illegible] F. 972, affirmed 38 S. Ct. 424, 246 U. S. 657, 62 L. Ed. [illegible].

In a proceeding by Habeas Corpus, an executive warrant for the arrest of a fugitive from justice ought not to

be pronounced void merely because of some technical defect in the foreign indictment or affidavit, provided the offense is substantially alleged or described. *Webb* v. *York*, Colo. 1897, 79 F. 616, 25 C. C. A. 133.

POINT VI

The petition for a Writ of Certiorari should be denied and the relators-petitioners remanded to the custody of the respondents to await the action of the Department of State in returning the relators-petitioners to Canada for trial.

Respectfully submitted,

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October Term, 1959

No. 472

UNITED STATES OF AMERICA, EX REL. SOL R. RAUCH and HAROLD D. RAUCH,

Relators-Petitioners,

against

JOSEPH STOCKINGER and ALEX KRINSKY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO FILE PETITION FOR REHEARING OF A PRIOR APPLICATION FOR A WRIT OF CERTIORARI, ON BEHALF OF THE ATTORNEY GENERAL OF THE PROVINCE OF ONTARIO, CANADA, AS *AMICUS CURIAE*

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Facts

On or about August 21, 1958, the Government of Canada made formal request to the Secretary of State of the United States for the extradition and delivery of the Defendants, Sol R. Rauch and Harold D. Rauch, accused of committing the crime of theft of money and securities and of fraudulently obtaining money and securities by deceit, falsehood or other fraudulent means, committed within the jurisdiction of Canada. On or about August 26, 1958, the Acting Secretary of State of the United States acknowledged receipt of this request, and informed the Ambassador of Canada that the Department of State will be pleased to give consideration to this request when the necessary legal procedures set forth in Section 3184 of Title 18 of the United States Code have been completed.

On or about September 26, 1958, complaints were filed against each of the defendants with the United States Commissioner for the Eastern District of New York, and

warrants issued for their apprehension. On October 6, 1958, both defendants surrendered to United States Marshal, and were arraigned before Honorable Salvatore T. Abruzzo, where they were paroled in their own custody, pending a hearing subsequently set for October 24, 1958.

After hearings held on November 5, 18, 21 and 26, 1958, before Honorable Salvatore T. Abruzzo, United States Commissioner for the Eastern District of New York, a determination was made by the Commissioner in part as follows:

> "The prosecution has, by ample evidence, established probable cause that the crime of larceny as contained in the Penal Law of Canada, and as defined by the Treaties and Supplementary Conventions thereto, and the Penal Laws of the State of New York, was committed by the Defendants, and the Commissioner will certify to the Secretary of State that the Defendants be extradited to the Province of Ontario, Canada, for prosecution." (Minutes of Hearing, page 217—line 20 to page 218, line 5.)

After this decision by the Commissioner, the defendants were remanded to the custody of the United States Marshal. They were subsequently released on bail, pending the determination of the Writ of Habeas Corpus.

In an opinion dated February 16, 1959, Honorable Mortimer W. Byers dismissed the Writ of Habeas Corpus.

Thereafter an appeal was taken from the decision of Honorable Mortimer W. Byers to the United States Circuit Court of Appeals for the Second Circuit.

The United States Circuit Court of Appeals for the Second Circuit, by its mandate decided July 10, 1959, unanimously affirmed the decision of Judge Byers.

Thereafter, a Petition for rehearing of the Appeal to the United States Court of Appeals for the Second Circuit was unanimously denied by said Court on August 3, 1959.

Thereafter, a motion for a stay of the issuance of the Mandate of the United States Court of Appeals for the Second Circuit was unanimously denied by said Court on August 17, 1959.

A motion before the Supreme Court of the United States for a stay of all proceedings pending the petiton for a Writ of Certiorari to the Supreme Court was withdrawn by the relators-petitioners. This petition had been returnable on September 2, 1959.

A motion for a stay of all proceedings pending the Petition for a Writ of Certiorari to the Supreme Court of the United States was made in the United States District Court for the Eastern District of New York, and was granted by Honorable Matthew T. Abruzzo, on September 22, 1959, on condition that said petition for a Writ of Certiorari be filed in the United States Supreme Court within thirty days from the date of the entry of the order.

The Petition for a Writ of Certiorari was duly filed with the Supreme Court of the United States and on December 7, 1959, said petition was denied.

Thereafter, on or about December 30, 1959, a petition to re-argue the original petition for the issuance of a Writ of Certiorari was filed in the United States Supreme Court. At the same time a motion for a stay of all proceedings, pending the petition to re-argue, was denied by Honorable John R. Bartels, Judge of the United States District Court for the Eastern District of New York on January 18, 1960. The relators-petitioners thereupon withdrew the petition to re-argue before the United States Supreme Court on January 19, 1960, and thereafter filed a petition for leave to re-argue the petition for a writ of certiorari before the United States Supreme Court, a copy of which was served on or about January 27, 1960.

In the interim, another motion was made for a stay of all proceedings, pending the determination by the United States Supreme Court of the petition for leave to re-argue the petition for a writ of certiorari, before Honorable Mor-

timer W. Byers, Chief Judge of the United States District Court for the Eastern District of New York. On January 21, 1960 this motion was argued before Judge Byers, who refused to either grant or deny same, but reserved decision pending the decision of the United States Supreme Court of the petition for leave to re-argue.

POINT I

The petition for leave to re-argue the petition for a writ of certiorari should be denied.

An analysis of all of the proceedings heretofore had herein, and the case upon which all previous determinations were based, lead to the conclusion that this Honorable Court should deny the petition for leave to re-argue the petition for a writ of certiorari. Such a conclusion is completely in accord with the rules applied by this Court in *Alabama Power Co.* v. *Ickes*, 1938, 85 S. Ct. 300, 302 U. S. 464, 82 L. Ed. 374, in which this Court held that findings of fact made after hearing by District Judge on undisputed or unconflicting evidence, not questioned by Appellate Court and not without substantial support in evidence, were acceptable by the Supreme Court as unassailable.

Despite the protestations of the relators-petitioners' attorney that the many attempts to delay the final return of the relators-petitioners to Canada for trial are made in good faith, and not for the purpose of delay, it is obvious that they are grasping at straws and making a mockery of the ordinary procedure of our Courts, in avoiding the bringing of this matter to a final conclusion. The Province of Ontario, Canada, has been put to extraordinary expenses and unusual delays in bringing to trial, not only these two individuals, but three others named in said indictment who have already been arraigned and are awaiting trial. Other attorneys are involved, as well as the Courts of Canada, so that continued delay, in a matter so clearly properly de-

cided in every Federal Court of the United States, is completely frustrating to every one concerned. Every constitutional right of the relators-petitioners has been guarded and protected throughout all these proceedings and the time has come, we respectfully urge, for a consideration of others involved in these proceedings.

As pointed out in our brief filed in opposition to the original petition for a writ of certiorari, the indictment under attack is superfluous in obtaining extradition to a foreign country. The authenticated affidavits of the witnesses who testified in Canada, not only before the Justice of Peace who issued the warrants in Toronto, but also before the Grand Jury, are fully sufficient to apprise the relators-petitioners of the crime with which they are charged, and certainly sufficient, not only to prepare their defense, but to protect them from double jeopardy, completely satisfying the requirements of the Fifth and Sixth Amendments of the Constitution of the United States.

The alleged basis for the present application by the attorney for the relators-petitioners is his accidental discovery of the case of *White* v. *U. S.*, 67 F. (2d) 71. His conclusions as to the effect of the holding in that case on the instant case is sheer sophistry. Even in the majority opinion, the Court admits that the Tenth Circuit has a rule of its own in connection with the requirements of an indictment. The majority opinion at page 78 says:

> "If it may be said that there are two schools of Judicial thought in regard to the indefiniteness of indictments, we of the Tenth Circuit are committed to the more stringent rule", * * *

The decision of the majority in the *White* case, as shown in the dissenting opinion, is contrary to the rule as established by decisions in the Second, Fourth, Fifth, Sixth and Eighth Circuit Courts.

The *White* case deals entirely with an indictment in a bankruptcy matter, and the difficulties in such cases of

setting forth specifically the alleged properties, the subject of the crime charged. In almost every instance, the sufficiency of the indictment is or should be the object of a demurrer. In our instant case, the indictment can only be tested in the Courts of Canada, and the relators-petitioners will be fully protected in their rights by said Courts.

The holding in *White* v. *U. S.* (*supra*), is contrary to the holding in *Greenbaum* v. *United States* (C. C. A.), 280 F. 474, which held an indictment sufficient which described the property concealed as "consisting of money and merchandise to the value of $30,000.00". In that case, the Trial Court overruled the demurrer to the indictment, but sustained a demand for a bill of particulars, and the Court of Appeals approved.

See also:

Keshinsky v. *U. S.* (C. C. A.) Fifth Circuit, 12 F. (2d) 767, 768;

Kanner v. *U. S.* (C. C. A.) Second Circuit, 21 F. (2d) 285, 286;

Saleeby v. *U. S.* (C. C. A.) Fourth Circuit, 21 F. (2d) 713, 714;

Gerson v. *U. S.* (C. C. A.) Eighth Circuit, 25 F. (2d) 49, 52.

There are six headnotes cited as a preface to the decision in *White* v. *U. S.* (*supra*). We agree with the conclusions in all of them, but respectfully urge that none of them affect the prior determination of this Court in the instant case—for all of them have been complied with insofar as this extradition is concerned.

The crux of the determination of the majority in *White* v. *U. S.* (*supra*), appears to be based on the allegation contained in the indictment, as follows:

> "Did knowingly, fraudulently and feloniously conceal personal property of the said Pig Skin Davis, Incorporated of the total value of Seventeen Thou-

sand ($17,000.00) Dollars, *a more particular description thereof, being to the Grand Jurors unknown*". (Italics ours.)

In *Greenbaum v. United States* (*supra*), the indictment charged:

> "Said property consisting of money and merchandise to the value of $20,000." In holding this indictment sufficient the Court said "The indictment discloses in plain and unambiguous terms all the essential elements of the offense charged".

In *Keshinsky v. United States* (*supra*) the indictment charged in part:

> "A more particular description of which is to your Grand Jurors otherwise unknown". The Court held this indictment to be sufficient and affirmed the conviction.

In *Kanner, et al. v. United States* (*supra*), the indictment charged:

> "did * * * unlawfully, knowingly and fraudulently, and while they were bankrupts as aforesaid conceal from [their trustees] certain monies and properties then and there belonging to the estate in bankruptcy, to wit, monies and certain other property of divers amount, the exact amount and more particular description of which are to the Grand Jurors unknown". The Court upheld the sufficiency of this indictment.

It is therefore obvious that *White v. U. S.* (*supra*), is unreliable and certainly not followed in the many other Circuit Courts of Appeals, and should not under any circumstances be sufficient to persuade this Court to reverse its previous rulings in the case at bar.

The indictment in the instant case provides in Count I thereof, as follows:

> "Did steal money and securities to the value of $960,000.00 more or less, the property of Brilund,

Mines Limited, contrary to the Criminal Code".

And in Count 2 thereof:

"by deceit, falsehood or other fraudulent means defrauded Brilund Mines Limited of money and securities to the value of $960,000.00 more or less, contrary to the Criminal Code".

It is obvious that the indictment, under the leading cases, definitely apprises the relators-petitioners of the specific crimes with which they are charged, so that they are sufficiently enabled to prepare their defense to same, and are provided amply with protection against being hereafter placed in double jeopardy.

We respectfully refer to this Court, and ask that same be considered, the previous brief filed herein in opposition to the petition for a writ of certiorari.

CONCLUSION

The petition for leave to file a petition for rehearing of the prior petition for a writ of certiorari should be denied and the relators-petitioners remanded to the custody of the respondents to await the action of the Department of State in returning the relators-petitioners to Canada for trial.

Respectfully submitted,

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SUPPLEMENTAL PETITION FOR LEAVE TO FILE THE PETITION FOR RE-HEARING OF A PRIOR APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Counsel for the relators-petitioners herein has very carefully studied the brief submitted in opposition on behalf of the Attorney General of the Province of Ontario, Canada, as *amicus curiae.*

There are contained therein several erroneous conclusions and statements which compel this reply brief. It is respectfully submitted with the intent of clarifying the situation and to point out the dissimilarity of the authorities cited in the opposition brief.

A careful study of the opposing brief will definitely demonstrate that an attempt has been made to confuse the issues and the record facts, in the light of inapplicable citations of authority therein cited.

The petitioners have consistently urged and justifiably so, that the United States Commissioner before whom a so-called hearing was conducted had no jurisdiction to hear the same, much less to rule thereon.

There is no demonstration to the contrary in the instant opposing brief nor was there any in the opposing brief to the main petition, that there was compliance with Section 3184 of Title 18 of the United States Code because indisputably, there was no complaint against these petitioners filed with the Commissioner containing charges against them. It has been definitely held that in the absence of a valid and subsisting complaint, no proper foundation has been laid for the conduct of a hearing and similarly, no evidence could properly have been submitted or received thereat. Besides, what was submitted in the guise of evidence in the instant case, was purely hearsay.

On the several applications to the Courts by these petitioners and the appeals taken by them, the lack of jurisdiction was clearly pointed out.

It has been uniformly held and it is a well established and recognized principle of law that jurisdiction cannot be conferred by consent or even by implication when none basically existed. Indeed, this principle is quite elementary.

It must be remembered that the instant extradition proceedings are maintainable *only* when full compliance has been had with the applicable treaty provisions.

The treaty provisions applicable in the instant case clearly and unequivocally provide that in order to institute and maintain a valid hearing before the United States Commissioner, a complaint containing specific charges must be filed with the Commissioner.

In the instant case, what purportedly was filed as a complaint, is completely deficient and devoid of facts as to a recital of specific charges against the individual petitioners here.

What was set forth in the purported complaint was a recital of conclusions as to what happened before a Justice of the Peace in Canada, and a reference to an indictment in the foreign jurisdiction. That is not a sufficient com-

pliance with the Treaty provisions which require current charges to be specified in the complaint before the Commissioner.

It is true that the *White* v. *United States* case cited by these petitioners in their petition for leave to file a petition for rehearing of their prior application originated with bankruptcy proceedings.

The citations presently offered by the opposition likewise emanated with bankruptcy proceedings. However, the indictments in those cases recite the necessary ingredients required for indictments for concealment of assets and where overt "acts" were not recited in those indictments, they did contain a recital that "a more particular description of all of the same (referring to the assets) being to the Grand Jurors, unknown."

In the instant case, the indictment from Canada does not contain the recital of any overt "acts" and neither does it contain any statement that "a more particular description of all of the same (referring to the assets), being to the Grand Jurors, unknown."

The foregoing distinction is quite clear. It renders the instant foreign indictment wholly defective and completely insufficient upon which to maintain extradition proceedings.

These petitioners pointed out in their instant main petition that they do not now nor did they heretofore seek, in this jurisdiction, a dismissal of the indictment because of the foregoing insufficiency but what they did urge was, that because of such insufficiency and defectiveness together with the incomplete complaint, there was no jurisdiction in the Commissioner to entertain the extradition proceedings nor to make any rulings with respect thereto.

In fact, it is these petitioners' contention that the entire proceedings before the United States Commissioner was a complete nullity. (Please see Contentions Nos. 1, 3 and 5 on pages 10, 20 and 23 of the petitioners' prior petition for the Writ of Certiorari.)

These petitioners further invite this Honorable Court's attention to the text contained on pages 3 and 4 of their prior petition for the Writ of Certiorari where they pointed out very succinctly, that the laws of the State of New York, together with the Treaty provisions controlled the hearing and disposition of the proceedings before the Commissioner. It is the total disregard of these specified requirements by the Commissioner and the lower courts which has brought this case to the attention of this distinguished tribunal for review, for which these petitioners reverently pray. (Please see Contention No. 2 on page 13 of the petitioners' prior petition for the Writ of Certiorari.)

The observation at the top of page 5 of the opposing brief on this application that "Every constitutional right of the relators-petitioners has been guarded and protected throughout all these proceedings * * *" is quite specious. Apparently, the Sixth Amendment to the Constitution is meaningless to that observer. That observer has not stated who did such purported guarding and protecting.

On the contrary, that same observer, according to the record, failed to prepare and submit to the Commissioner a proper complaint upon which to base the extradition proceedings and its conduct. It is this same observer who has up to the present time, failed to justify that omission. And, it is this same observer who now, undoubtedly through overzealousness, has attempted to confuse the issues and cite authorities which are clearly dissimilar, contrary to the established and recognized law and misleading.

Respectfully submitted,

MAX J. LEBOVER,
Attorney for Relators-Petitioners.

Certificate of Counsel

MAX J. LEBOYER, attorney for the petitioners, does hereby certify that in his opinion this Honorable Court overlooked the important features and points raised on the original application for the issuance of a writ of certiorari herein and also overlooked and misconstrued the applicability and effectiveness of the controlling decision of *White v. United States*, 67 F. (2) cited in this petition in support thereof.

I further certify that the foregoing supplemental petition for leave to file the petition for rehearing of the prior application for the issuance of the Writ of Certiorari directed to the Circuit Court of Appeals for the Second Circuit, is presented in good faith and not for delay.

MAX J. LEBOYER,
Attorney for Petitioners.